IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Bankers Association
1120 Connecticut Avenue
Washington, DC 20036

Plaintiff,

V. **Civil Action File No.**

National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THIS ACTION

1. This complaint under the Administrative Procedure Act ("APA") and the Federal Credit Union Act ("FCUA" or the "Act") challenges the membership rule promulgated and approved by the National Credit Union Administration on December 17, 1998 ("IRPS 99-1) that purports to implement certain aspects of the FCUA.

2. Plaintiff American Bankers Association seeks declaratory judgment that the IRPS 99-1 violates, rather than implements, the FCUA by expanding membership in "multiple common bond credit unions," "single common bond credit unions," and "community credit unions" beyond the limits intended by Congress. In addition, Plaintiff seeks declaratory judgment that IRPS 99-1 violates the FCUA by defining too broadly the phrase "immediate family and household member" and applying too broadly the statutory

provision that "grandfathers" certain persons' eligibility for membership in existing federal credit unions.

3. Plaintiff also seeks declaratory judgment that the NCUA made IRPS 99-1 effective less than 30 days after publication in the Federal Register in violation of the Administrative Procedure Act, 5 U.S.C. § 553(d).

4. Plaintiff seeks injunctive relief setting aside and prohibiting the NCUA from approving applications or taking other action based on IRPS 99-1.

JURISDICTION

5. This action arises under the Administrative Procedure Act, 5 U.S.C. 701, et seq., and the Federal Credit Union Act, 12 U.S.C. § 175 1, et seq. This Court has jurisdiction over this action under 28 U.S.C. § 133 1.

6. Venue is properly laid in this district under 28 U.S.C. § 1391.

PARTIES

7. Plaintiff American Bankers Association ("ABA") is the largest national trade association of the banking industry in the United States. ABA represents commercial and savings banks and savings and loans associations operating in all fifty states and the District of Columbia.

8. Defendant National Credit Union Administration ("NCUA") is an agency of the United States Government and is responsible for administering the Federal Credit Union Act, 12 U.S.C. § 1751 et seq.

FACTUAL BACKGROUND

A. The NCUA's Membership Rule

9. Federal credit unions are mutually owned financial institutions chartered and regulated by the NCUA pursuant to the FCUA. They have tax and regulatory advantages over the banks that compete with them for business.

10. In 1990, the ABA and certain member institutions filed suit against the NCUA challenging the agency's policy of chartering credit unions comprised of an unlimited number of unrelated common bond groups, contending that the NCUA's policy violated the "common bond" requirement set forth in the Federal Credit Union Act as originally enacted. In February 1998, the United States Supreme Court ruled in favor of the ABA, invalidating the NCUA's policy of chartering "multiple group credit unions." National Credit Union Administration v. First National Bank & Trust Co.. et al., 118 S.Ct. 927 (1998).

11. In August 1998, the Congress passed, and President Clinton signed into law, the Credit Union Membership Access Act ("CUMAA"). The CUMAA amended the Federal Credit Union Act.

12. The CUMAA was compromise legislation. It allowed federal credit unions to retain their then-existing members and permitted the chartering of multiple common bond credit unions in certain limited circumstances (notwithstanding the Supreme Court's decision in NCUA v, First National Bank & Trust Co.); but the CUMAA also established new limitations on

the formation of, and membership in, federal credit unions, including new limitations on "multiple common bond credit unions."

13. Under the authority granted to it by the FCUA, the NCUA on September 14, 1998 published a proposed rule for the stated purpose of implementing the limitations on credit union membership established by the Act. The proposed rule specifically addressed the FCUA's membership restrictions on "single common bond credit unions ... .. multiple commonbond credit unions" and "community credit unions." The proposed rule also addressed the limited exceptions to those restrictions provided in the Act, including the "grandfather" provision that permits a "member of any group whose membership constituted a portion of any federal credit union as of that date of enactment to *continue* to be eligible to become a member of that credit union, by virtue of membership in that group, after that date of enactment." 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added).

14. Plaintiff ABA timely submitted a comment letter that addressed proposals made in the NCUA's proposed rule. The ABA's comment letter explained that the NCUA's proposed rule violated the membership limitations established by the FCUA.

15. On December 17, 1998, the NCUA's board approved the proposed rule with certain modifications by a vote of 2 to I and made it effective (except for those sections relating to "community credit unions" and defining "immediate family and household member") on January 1, 1999. The rule as approved on December 17, 1998 did not purport to make a finding of "good cause" justifying the agency's decision to make it effective less than 30 days after its publication in the *Federal Register*.

16. The final rule was published in the Federal Register on December 30, only

2 days in advance of the rule's effective date. The NCUA has, since approving the rule on December 17, revised the rule so that it now includes a statement purporting to justify a finding of "good cause" to make the rule effective less than 30 days after its publication in the *Federal Register*.

B. Effective Date of the Rule Violates the APA

17. The NCUA in making its rule effective less than 30 days after the publication of that rule in the Federal Register violated the APA which generally requires that "publication of a substantive rule shall be made not less than 30 days before its effective date... 5 U.S.C. § 553(d).

C. The NCUA's Final Rule Violates the FCUAIs Limitations on the Formation of, and Membership in, Federal Credit Unions

18. The NCUA's final rule violates the FCUA's limitations on the formation of, and membership in, federal credit unions. Among other things:

a. The NCUA's final rule violates the FCUA's limitations on the formation of "multiple common bond credit unions."

b. The NCUA's final rule violates the FCUA's membership limitations on "single common bond credit unions."

c. The NCUA's final rule violates the FCUA's limitations on mergers of credit unions with dissimilar common bonds.

d. The NCUA's rule violates the "grandfather" provision of the FCUA that permits a current "member of any group whose membership constituted a portion of any federal credit union as of that date of enactment to *continue* to be eligible to

become a member of that credit union, by virtue of membership in that group, after that date of enactment." 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added).

e. The NCUA's rule violates the membership limitations of the FCUA

by implementing provisions that define eligibility as both an "immediate family" and "household" member in an impermissibly broad manner.

f. The NCUA's rule undermines and violates the membership limitations of the FCUA because it does not limit membership in a community credit union to persons within a "well-defined local community, neighborhood or rural district."

E. Injury to Plaintiff

19. Members of the American Bankers Association, for whom ABA appears here in representative capacity, operate in all markets in the fifty states and the District of Columbia and compete with federal credit unions for business.

20. By reason of the approval by the NCUA of a membership rule that unlawfully expands membership in, and eases restrictions on the formation of, federal credit unions, ABA members will be subject to unlawful competition in their business or potential business, which competition would not exist but for the unlawful approval of the NCUA's field of membership rule. The NCUA's approval of this field of membership rule inflicts and threatens serious competitive injury to ABA members.

CLAIMS FOR RELIEF

Count One

21. Paragraphs 1-20 are incorporated herein by reference.

22. The NCUA's promulgation of its field of membership rule did not comply with the requirements of the APA because NCUA made the rule effective less than 30 days after its publication in the Federal Register. 5 U.S.C. § 553(d). Any action by the NCUA in reliance on -or pursuant to the rule prior to that date is unlawful, null and void.

Count Two

23. Paragraphs 1-22 are incorporated herein by reference.

24. The NCUA's field of membership rules violate the membership limitations placed by the FCUA on the formation of, and membership in, "multiple common bond credit unions," and set forth in 12 U.S.C. 1751 et seq., and are therefore unlawful, null and void.

25. The NCUA's field of membership rules relating to the formation of, and membership in, "multiple common bond credit unions" are arbitrary, capricious, an abuse of discretion, and not in accordance with law and therefore are unlawful, null and void. 5 U.S.C. & 706.

26. By reason of the NCUA's adoption of rules relating to the formation of, and membership in, "multiple common bond credit unions" that unlawfully expand the membership limitations of the FCUA, members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate the membership limitations of the FCUA inflicts and threatens serious competitive injury to members of the American Bankers Association.

Count Three

27. Paragraphs 1-26 are incorporated herein by reference.

28. The NCUA's field of membership rules violate the membership limitations placed by the FCUA on the formation of, and membership in, "single bond common bond credit unions," as set forth in 12 U.S.C. 1751 et seq., and are therefore unlawful, null and void.

29. The NCUA's field of membership rules relating to the formation of, and membership in, "single common bond credit unions" are arbitrary, capricious, an abuse of discretion, and not in accordance with law and therefore are unlawful, null and void. 5 U.S.C. § 706.

30. By reason of the NCUA's adoption of rules relating to the formation of, and membership in, "single common bond credit unions" that unlawfully expand the membership limitations of the FCUA, members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate the membership limitations of the FCUA inflicts and threatens serious competitive injury to members of the American Bankers Association.

Count Four

31. Paragraphs 1-30 are incorporated herein by reference.

32. The NCUA's field of membership rules violate the limitations placed by the FCUA on the merging of credit unions with dissimilar common bonds, and set forth in 12 U.S.C. 1751 et seq., and are therefore unlawful, null and void.

33. The NCUA's field of membership rules relating to the merging of credit unions with dissimilar common bonds are arbitrary, capricious, an abuse of discretion, and not in accordance with law and therefore are unlawful, null and void. 5 U.S.C. § 706.

34. By reason of the NCUA's adoption of rules relating to the merging of credit unions with dissimilar common bonds that unlawfully expand the membership limitations of the FCUA, members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate the membership limitations of the FCUA inflicts and threatens serious competitive injury to members of the American Bankers Association.

Count Five

35. Paragraphs 1-34 are incorporated herein by reference.

36. The NCUA's field of membership rules violate the "grandfather" provision of the FCUA that permits a "member of any group whose membership constituted a portion ofany federal credit union as of that date of enactment to continue to be eligible to become a member of that credit union, by virtue of membership in that group, after that date of enactment," 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added), and are therefore unlawful, null and void.

37. The NCUA's field of membership rule insofar as it expands the "grandfather" provision of the FCUA is arbitrary, capricious, an abuse of discretion, and not in accordance with law and therefore is unlawful, null and void. 5 U.S.C. § 706.

38. By reason of the NCUA's adoption of rules that unlawfully expand the "grandfather" provision of the FCUA members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate limitation found in 12 U.S.C. § 1759(c)(1)(A)(ii) inflicts and threatens serious competitive injury to members of the American Bankers Association.

Count Six

39 Paragraphs 1-38 are incorporated herein by reference.

40. The NCUA's field of membership rule violates the limitations placed by the, FCUA on federal credit union membership, as set forth in 12 U.S.C. § 1751, et seq., by implementing provisions that define eligibility as both an "immediate family" and "household" member in an impermissibly broad manner and are therefore unlawful, null and void.

41. In implementing provisions that define eligibility as both an "immediate family" and "household" member in an impermissibly broad manner, the NCUA's actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law and those definitions therefore are unlawful, null and void. 5 U.S.C. § 706.

42. By reason of the NCUA's implementation of rules that violate the FCUA's membership limitations by defining eligibility as both an "immediate family" and "household" member in an impermissibly broad manner, members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate the membership limitations established by the FCUA inflicts and threatens serious competitive injury to members of the American Bankers Association.

Count Seven

43. Paragraphs 1-42 are incorporated herein by reference.

44. The NCUA's field of membership rule violates the limitations placed by the

FCUA on the formation of, and membership in, community credit unions, as set forth in 12 U.S.C. § 175 1, et seq., because it does not limit membership in such credit

unions to persons within a "local community, neighborhood or rural district," and is therefore unlawful, null and void.

45. The NCUA's field of membership rules relating to the formation of, and membership in "community credit unions" are arbitrary, capricious, an abuse of discretion, and not in accordance with law and therefore are unlawful, null and void. 5 U.S.C. § 706.

46. By reason of the NCUA's adoption of rules relating to the formation of, and membership in, "community credit unions" that unlawfully expand the membership limitations of the FCUA, members of the American Bankers Association are subject to unlawful competition as described above. The NCUA's adoption of rules that violate the membership limitations of the FCUA inflicts and threatens serious competitive injury to members of the American Bankers Association.

RELIEF REQUESTED

Wherefore, Plaintiff requests that this Court enter judgment, pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202:

(1) Declaring that IRPS 99-1 can only become effective 30 days after its publication in the Federal Register and any action taken by NCUA pursuant to the membership rules set forth in IRPS 99-1 before the expiration of the APA's 30 day waiting period is unlawful, null and void;

(2) Declaring that the NCUA's rules relating to the formation of, and membership in, multiple common bond credit unions, as set forth in IRPS 99-1, are unlawful, null and void;

(3) Declaring that the NCUA's membership rules relating to the

formation of, and membership in, single common bond credit unions, as set forth in IRPS 99-1, are unlawful, null and void;

(4) Declaring that the NCUA's membership rules relating to the merging of credit unions comprised of group(s) having multiple common bonds, as set forth in IRPS 99-1, are unlawful, null and void;

(5) Declaring that the NCUA's membership rule purporting to implement the provision of the FCUA that permits a "member of any group whose portion of any federal credit union as of that date of enactment to *continue* to be eligible to become a member of that credit union, by virtue of membership in that group, after that date of enactment," 12 U.S.C. & 1795(c)(1)(A)(ii) (emphasis added), as set forth in IRPS 99-1, is unlawful, null and void;

(6) Declaring that the definitions of "immediate family" and "household" member provided by the NCUA in its membership rule, as set forth IRPS 99-1, are unlawful, null and void;

(7) Declaring that the NCUA's membership rules relating to the formation of, and membership in, community credit unions, as set forth in IR-PS 99-1, are unlawful, null and void;

(8) Enjoining the NCUA from making its membership rule effective less than 30 days after publication of that rule in the Federal Register and suspending any action taken pursuant to that membership rule;

(9) Enjoining the NCUA from implementing the membership rules relating to the formation of, and membership in, multiple common bond credit unions;

(10) Enjoining the NCUA from implementing its membership rules

relating to the formation of, and membership in, single common bond credit unions;

(11) Enjoining the NCUA from implementing its membership rules relating to merging of credit unions comprised of group(s) having different common bonds;

(12) Enjoining the NCUA from implementing the rule that purports to implement the provision of the FCUA that permits a "member of any group whose membership constituted a portion of any federal credit union as of that date of enactment to continue to be eligible to become a member of that credit union, by virtue of membership in that group, after that date of enactment," 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added);

(13) Enjoining the NCUA from implementing the provisions of its membership rule that define credit union membership eligibility for "immediate family" and "household" members;

(14) Enjoining the NCUA from implementing its membership rules relating to the formation of, and membership in, community common bond credit unions;

(15) Ordering the NCUA to pay Plaintiffs costs; and

(16) Granting such other relief, including preliminary relief, as the Court may find just and reasonable.

Respectfully Submitted,

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Date: January 8, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Bankers Association
1120 Connecticut Avenue
Washington, D.C. 20036

Plaintiff,

V. **Civil Action**
File No:

National Credit Union Administration
1775 Duke Street Alexandria, VA 22314

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF AMERICAN BANKERS ASSOCIATION'S APPLICATION FOR A PRELIMINARY INJUNCTION

This lawsuit challenges a rule approved by defendant National Credit Union Administration ("NCUA") on December 17, 1998 that purports to implement the limitations on credit union membership established by the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751, et seq. Plaintiff American Bankers Association ("ABA") seeks a preliminary injunction preventing the NCUA from approving applications or taking other action based on that rule, on the grounds that the rule violates (rather than enforces) the membership limitations of the FCUA, and was made effective in violation of the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.[1/]

[1/] **The ABA's complaint also challenges the provisions of the NCUA's rule that define the terms "immediate family or household member" and "local well-defined community credit union" and become effective on March 5, 1999. The ABA does not at this time seek a preliminary injunction as to those provisions of the NCUA's membership rule.**

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Credit Unions Generally

Federal credit unions are mutually owned financial institutions chartered and regulated by the NCUA pursuant to the Federal Credit Union Act. By statute and regulation, federal credit unions are allowed to provide a range of ordinary banking services, including issuing deposit accounts (technically, selling "shares") and consumer loans, and providing checking account services.

Federal credit unions have tax and regulatory advantages over the banks that compete with them for business. For example, credit unions are exempt from federal taxation, 12 U.S.C. § 1768, and the requirements of the Community Reinvestment Act, 12 U.S.C. § 2902, while banks are subject to both. Congress has tempered the regulatory advantages enjoyed by federal credit unions, and sought to limit their economic impact on banks, by restricting credit unions from competing with banks on an unlimited basis. Specifically, credit unions have generally been prohibited from serving persons who are not credit union members and credit union membership has always been subject to explicit statutory limitations. See, e.g., 12 U.S.C. 1759(b) (requiring that "the membership of any Federal credit union shall be limited"). The NCUA, as regulator under the Act, is supposed to enforce the FCUA's membership imitations.

2. Prior Litigation Between ABA and NCUA

In 1990, the ABA and certain of its members filed a lawsuit challenging the NCUA's policy of chartering credit unions comprised of an unlimited number of unrelated occupational and associational groups. The ABA challenged the NCUA's chartering policy

on the ground that it violated the then-existing requirement that membership in all federal credit unions be limited to "groups hav[ing] a common bond of occupation or association. . . " The United States Supreme Court agreed with the ABA and on February 25, 1998 ruled that the NCUA's practice of chartering multiple common bond credit unions violated the membership limitations of the FCUA. National Credit Union Admin. v, First Nat'l Bank & Trust Co., 118 S.Ct. 927 (1998).

3. The Credit Union Membership Access Act

About six months after the Supreme Court decision in First National Bank Congress passed, and President Clinton signed into law, the Credit Union Membership Access Act ("CUMAA" or the "Act"), Public Law 105-219,112 Stat. 913 (1988). The CUMAA was compromise legislation designed to mitigate the impact of the First National Bank decision. Congress wanted to "ensure the continued safety and soundness of credit unions by permitting multiple common bond formations while preserving the integrity of the common bond concept established by the Federal Credit Union Act ... by imposing certain limitations on pemissible new groups that can be added to an existing credit union." H.R. Rep. No. 105-472, at 10 (1998). The CUMAA mooted the litigation then pending between the ABA and the NCUA by ballowing all federal credit unions to keep their then-existing members, and providing that others then eligible for membership under the NCUA's prior rules would "continue to be eligible" to join the credit union, notwithstanding the Supreme Court decision invalidating the membership rule by which they became members.

The CUMAA also changed the membership provision of the FCUA to provide or "single common bond unions." Each has a limited, identified membership. A "single common

bond credit union" is limited to "one group that has a common bond of occupation or association." 12 U.S.C. § 1759(b)(1). A "multiple common bond credit union" is limited to persons belonging to different "common bond groups" each of which is generally comprised of "fewer than 3,000 members" at the time it is included in the credit union. Id. § 1759(b)(2).2/

The statute provides a narrow exception to this 3,000 member limitation for a common bond group that could not "feasibly or reasonably" operate a separately chartered credit union for one of three reasons: (1) it lacks sufficient resources, (2) it has characteristics that might "affect the financial viability and stability of a credit union" or (3) it "would be unlikely to operate a safe and sound credit union." Id. at §1759(d)(2)(A) (i-iii). As the House and Senate Reports that accompanied the enactment of the CUMAA explain, in providing these "exceptions to the 3,000 member limitation," Congress did not "intend for these exceptions to provide the [NCUA] Board with broad discretion to permit larger groups to be incorporated within or merged with other credit unions," but instead intended that "[t]he exceptions" only "apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, present safety and soundness concerns." H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7 (1998).

2/ **As amended by the CUMAA, the FCUA also limits the membership field of a "community credit union" to "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). As noted above, the ABA's application for a preliminary injunction does not address the rule's implementation of the membership restrictions on community credit unions so this definition is not relevant to this motion.**

The CUMAA places additional limitations on the formation of multiple group credit unions. First, the CUMAA discourages the formation of multiple common bond credit unions even where the particular common bond group has fewer than 3,000 members. Congress made clear that in adopting the 3,000 member demarcation line it did "not intend for this numerical limitation to be interpreted as permitting groups with 3,000 or fewer members to be included within the field of membership of an existing credit union," H.R. Rep. No. 105-472, at 19, and the Act expressly requires that the NCUA in all cases encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union wherever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). The House Committee on Banking and Financial Services noted that the "3000 member figure is not intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions" because "over 3,300 credit unions have less than $2 million in assets and average just 700 members." H.R. Rep. No. 105-472, at 21.

Second, the CUMAA places a geographic limitation on the addition of new common bond groups to already existing credit unions by requiring that the existing credit union be "within reasonable proximity" of the group being added. 12 U.S.C. § 1759(f)(1)(a). Congress did not expressly define the phrase "within reasonable proximity," but did indicate that by including this requirement it intended to provide a serious geographic restriction on the formation of multiple common bond credit unions. For example, Congressman John. J. LaFalce, the drafter of the provision, said that "[t]his 'proximity' requirement is extremely important, and I insisted on its inclusion in the bill to ensure that we maintain, to the maximum extent practicable, the closest

feasible geographic common bond. It was my intent in offering this provision that the NCUA give a conservative interpretation to the term 'reasonable proximity,' allowing credit unions in larger cities to incorporate only common bond groups located within nearby sections of that city." 144 Cong. Rec. H7050 (daily ed. Aug. 4, 1998) (Statement of Rep. LaFalce). Both the Senate and House Reports indicate that a credit union's "service facility" --one of the benchmarks for determining whether a credit union is "within reasonable proximity" of the group being absorbed -- should retain the narrow meaning it had under prior NCUA rules and should not include "an automatic teller machine or similar device." H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7.

B. The NCUA'S Promulgation of its New Membership Rule

1. The Rulemaking Proceeding

The CUMAA directed the NCUA to promulgate rules and regulations implementing its requirements. See, e.g., 12 U.S.C. § 1759(d)(3). On September 14, 1998, the NCUA issued, and made available for public comment, a proposed rule that revised its policies with respect to field of membership issues. S(Lt "Organization and Operations of Federal Credit Unions," 63 Fed. Reg. 49164 (1998). The agency allowed for a 60-day comment period.

On November 13, the ABA timely submitted a letter commenting on the NCUA's proposed rule and identifying instances where the rule, as proposed, violated the membership limitations contained in the FCUA. (Attached as Exhibit A to the Declaration of Jonathan Mastrangelo) (January 7, 1998) ("Mastrangelo Declaration").

During this comment period, the NCUA received other letters that were also critical of its proposed rule. Congressman John J. LaFalce, ranking minority member of the House

Banking Committee and one of the architects of the CUMAA, wrote that "there are at least four key provisions of the proposed regulations where NCUA staff has either misunderstood the purpose or intent of the legislative language, or has deliberately sought to provide the legislative language with an iterpretation contradictory to what Congress intended." See November 12, 1998 Letter of Congressman LaFalce at I (attached as Exhibit B to the Mastrangelo Declaration). Congressman LaFalce specifically identified the NCUA's purported implementation of two of the FCUA's limitations on the formation of multiple group credit unions -- the 3,000 member limit on the groups being added to existing credit unions and the requirement that the existing credit union be within "reasonable proximity" of the group being added -- as being contrary to Congressional intent. a Congresswoman Marge Roukema, Chairman of the Financial Institutions Subcommittee of the House, also wrote to express her "concern[] that the NCUA's proposed rule does not reflect Congressional intent with respect to the limits on the expansion of multiple common bond credit unions and the formation of new credit unions." December 9, 1998 Letter of Congresswoman Roukema at 2 (attached as Exhibit C to the Mastrangelo Declaration).

On December 17, 1998 -- about 30 day after the close of the 60-day comment period -- the NCUA approved its final field of membership rule, which is formally referred to by the agency as "IRPS 99-1," by a 2 to I vote. The provisions of the final rule that govern the chartering of multiple common bond credit unions are materially identical to the provisions of the proposed rule that were criticized by Congressman LaFalce, Congresswoman Roukema and the ABA.

NCUA Chairman Norman D'Amours dissented from approval of the membership rule in part because he believed that the NCUA erred by creating a presumption against the chartering of federal credit unions with fewer than 3,000 members. Chairman D'Amours also expressed concern regarding the membership rule's purported implementation of the CUMAA's geographic limitation on the addition of new common bond groups to existing credit unions.[3/]

The NCUA purported to make the final effective on January 1, 1999, even though it was not published in the Federal Register until December 30, 1998, and the APA provides that a rule cannot be made effective less than 30 days after publication in the Federal Register unless the agency has "good cause" for doing so. 5 U.S.C. § 553(d).[4/] Indeed, as approved on December 17, the rule and statement of basis and purpose did not contain anything about "good cause." &,& Rule as Approved on December 7 at 46 (attached as Exhibit E to the Mastrangelo Declaration. As published, the rule did purport to state "good cause" for becoming effective on January 1, 1999, apparently added by the NCUA based on the votes of two Board members on December 22, 1998 (attached as Exhibit F to the Mastrangelo Declaration).

[3/] Counsel for the ABA has requested a copy of the administrative record by FOIA requested a copy of Chairman D'Amours' dissent, by both FOIA request and letter to the NCUA's General Counsel; to date, the NCUA has not provided the ABA with copies of any of the requested documents. The details of Chairman D'Amours' dissent, outlined generally above are from an article published in the credit union trade journal, Credit Union Times See NCUA Board Acts on New Chartering Manual, Credit Union Times, Dec. 23, 1998 (attached as Exhibit D to the Mastrangelo Affidavit) .

[4/] The NCUA's definitions of " immediate family member" and "community credit unions" -- which the ABA does not address in this motion -- were designated "major rules" and are made effective on March 6, 1999.

The statement of cause belatedly added to the membership rule was not based on an existing "emergency." The justification for immediate effectiveness was simply the NCUA's "belie[fl that credit unions are continuing to be harmed by the inability to add new" common bonds to existing credit unions. 63 Fed. Reg. at 72017. The NCUA did not cite any facts in the administrative record supporting that "belief." The disability which the NCUA now alluded to and relied on existing credit unions' inability to add new common bond groups to their existing membership had been in place since October 1996, when this Court (Jackson, J.) entered an order enforcing a D.C. Circuit opinion that invalidated the NCUA's earlier policy of permitting credit unions to include in their fields of membership an unlimited number of unrelated common bond groups (attached as Exhibit G to the Mastrangelo Declaration).

3. NCUA's Rapid and Aggressive Implementation of its New Multiple Group Credit Union Policy

The NCUA moved instantly, based on the new rule, to permit existing credit unions to the add new common bond groups. According to recent press reports, by January 4,1999, two regions of the NCUA had already approved the addition of 61 "select employee groups" to already existing credit unions pursuant to the new membership rule. SEG Application Approvals Roll in Under Roukema' Watchful Eye, Credit Union Times Breaking News (Jan. 5, 1999) [http:www.cutimes.com/breaking_news/br010599-1.html] (attached as Exhibit H to the Mastrangelo Declaration).

C. The NCUA's New Membership Rule

IRPS 99-1 undermines the membership limitations of the CUMAA, particularly the membership limitations on multiple common bond unions. By unlawfully easing the restrictions

on the formation and expansion of multiple common bond credit unions, the new membership rule increases size of the credit unions. See Declaration of James Chessen at 9 ("Chessen Decl.") ("Multiple-group credit unions tend to be larger than single group credit unions"). That increase, in turn, threatens ABA member institutions with serious competitive injury because as credit unions grow larger and amass more assets, their size, when combined with their regulatory and tax advantages, make it difficult for banks to compete with them for business. See id. At IT 12-13 (describing how credit unions "leverage" their tax and regulatory advantages to take customers from thrifts and banks). As we show below:

First, IRPS 99-1 unlawfully expands membership in a "single common bond credit union" to include multiple employer groups, even where the employer groups have little interaction and no meaningful alignment of interests.

Second, IRPS 99-1 unlawfully expands membership in multiple credit unions bond by permitting exceptions to the statute's 3,000 member limit on the basis of concerns not related to safety and soundness.

Third, IRPS 99-1 stands the CUMAA's 3,000 member limit on its head by establishing a presumption against the chartering of separate credit unions having fewer than 3,000 potential members. Id.at 72001.

Fourth, IRPS 99-1 unlawfully lowers the size of the common bond group for purposes of the 3,000 member limitation by considering only a portion of the group's membership rather than all of the potential members.

Fifth, IRPS 99-1 unlawfully permits unwarranted expansion of multiple common bond credit unions by allowing successfully operating credit unions with more than 3,000

aggregate members to merge so long as they "contain[]elect employee groups of less than 3,000 primary potential member." Id, at 72003.

Sixth, IRPS 99-1 unlawfully eases the geographic restriction on the formation of multiple common bond credit unions by dramatically expanding the meaning of the terms "service facility" and "reasonable proximity."

Seventh, IRPS 99-1 unlawfully expands membership eligibility in existing common bond credit unions by reading the CUMAA's provision that grandfathers the membership eligibility of persons who, on the date of enactment, were members of a group comprising a portion of a multiple common bond credit union as applying to persons who were not members of such groups on that date. Id. At 72015.

ARGUMENT

The ABA is entitled to a preliminary injunction preventing implementation of IRPS 99-1 because, as shown below, (1) it has a substantial likelihood of success on the merits, (2) it will suffer irreparable harm in the absence of the requested relief, (3) the NCUA will not suffer substantial harm if relief is granted, and (4) the public interest is furthered by the injunctive remedy. Under the law of this Circuit, a preliminary injunction should issue if the ABA shows "either a high probability of success and some injury, or vice versa." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); accord Washington Metro, Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Woerner v. Small Bus, Admin., 739 F. Supp. 641, 650 (D.D.C.1990).

A. The ABA Is Likely to Succeed on the Merits

1. IRPS 99-1 Violates the Membership Limitations of the FCUA

The ABA is likely to succeed on the merits of its substantive claim that IRPS 99-1 is invalid because it violates the limitations on credit union membership Congress added when enacting the CUMAA. It is settled law that an agency's interpretation of a statute must conform to congressional intent and that where it does not, it must be found invalid. See Chevron U.S.A., Inc. v. National Resources Defense Council. Inc.., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") Here, the NCUA's interpretation CUMAA violates the intent of Congress, as reflected in the language, structure and legislative history of the statue. See id, at 843 n.9 (court determines the intent of Congress by employing the "traditional tools of statutory construction"); see also Immigration & Naturalization Sery. v. Cardoza-Fonsec , 480 U.S. 421 (1987) (relying on the plain language, structure, and legislative history of statute in determining Congressional intent); NLRB v, United Food & Commercial Workers Union, 484 U.S. 112 (1987) (same).

First, the rule as written violates the statutory restriction on the formation of multiple common bond credit unions by:

(1) permitting exceptions to the statutorily mandated "3,000 member" limit where it has been demonstrated that concerns regarding safety and soundness prevent the the common bond group from forming a separately chartered credit union;

(2) creating a presumption against the chartering of separately operating credit unions with fewer than 3,000 " primary potential" member;

(3) excluding "family" and "household" members when determining whether a common bond group has more than 3,000 potential members;

(4) allowing mergers of financially strong credit unions having dissimilar common bonds;

(5) permitting the addition of a new common bond group to an existing credit union that is not "within reasonable proximity" of that credit union for purposes of the Act.

Second, the rule violates the CUMAA's limitation on membership in "single common bond credit unions" by allowing such credit unions to be comprised of multiple employer groups that have little or no meaningful interaction. Third, the rule violates the CUMAA by applying too broadly the exception that "grandfathers" the membership eligibility of certain persons.

First: Violations of The CUMAA's Limitations On Multiple Common Bond Credit Unions

a. IRPS 99-1 Violates the CUMAA By Permitting Exceptions to the 3,000 Member Limit On Multiple Common Bond Groups Where There Are No Safety and Soundness Concerns.

IRPS 99-1, as approved, violates the CUMAA by granting exceptions to the 3,000 member limit on the formation of, and addition of new groups to, multiple common bond credit unions on the basis of sponsor group preference. In so doing, IRPS 99-1 jeopardizes the competitive interests of ABA member institutions by severely undermining the 3,000 member limit

and thus promoting an unintended growth in both the number and size of multiple common bond credit unions.

A central feature of the compromise embedded in the CUMAA is its strict limitation on the formation of, and addition of new groups to, multiple common bond credit unions. As now amended, the FCUA provides that subject to narrow exceptions "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common bond credit union. 12 U.S.C. § 1759(d)(1).

The FCUA allows exceptions to the 3,000 member limit for common bond groups that would likely not succeed if chartered separately because they (1) lack sufficient resources to operate a credit union, (2) possess demographic or other characteristics "that may affect the financial viability and stability of a credit union," or (3) are found to be "unlikely to operate a safe and sound credit union." 12 U.S.C. § 1759(d)(2).

The legislative history makes clear that Congress intended for these to be narrow exceptions that would only be invoked by the NCUA where there are serious concerns regarding the particular group's ability to operate safely and soundly as a separately chartered credit union. Both the House and Senate Reports expressly state that "[t]he Committee does not intend for these exceptions to provide broad discretion to the [NCUA] Board to permit larger groups to be incorporated within or merged with other credit unions." H.R. Rep. No 105-472, at 19; S. Rep. No. 105-193, at 7. Instead, "[t]he exceptions are intended to apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, present safety and soundness concerns." Id. (emphasis added). The term "safety and soundness," while not defined by the FCUA, is 14 generally

understood in banking law to address concerns related to "action or lack of action, [1] which is contrary to generally accepted standards of prudent operation, [2] the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution. ... Johnson v. Office of Thrift Supervision , 81 F.3d 195, 201 n.8 (D.C. Cir. 1996) (quoting the Office of Thrift Supervision's definition of "unsafe or unsound practice").

The NCUA's new rule does not restrict the statute's exceptions to cases where operation of a "separately chartered credit union ... present[s] safety and soundness concerns. Instead, the NCUA's determination turns essentially on whether the new group wants to form a separately chartered entity. As the IRPS 99-1 explains, the NCUA considers the most important factors "the desire and intent of the group and the sponsor support." 63 Fed. Reg. at 72002. By the simple expedient of procuring and submitting to the NCUA "a letter from the CEO of the [the employer group] stating that it does not wish to form a new credit union," the common bond group will have produced "substantial evidence," in the NCUA's eyes, justifying an exception to the statute's 3,000 member limit. Id.at 72010-11.

But the preference of the sponsor group does not amount to concerns regarding the group's ability to operate safely and soundly; nor, for that matter, is it tangible, objective evidence that the group lacks the resources or demographics necessary to operate as a separately chartered entity. To the contrary, by relying primarily on the "desire" of the common bond group, the NCUA reinstates in substance the policy it had before the Supreme Court's decision in First National Bank, which allowed common bond groups to join existing credit unions (rather than be chartered as separate credit unions) when both they and the relevant existing credit union so desired. That is the very policy that Congress rejected when it adopted the 3,000 member 15 limit, and by

reverting to it, the NCUA's rule is contrary to the clear intent of Congress as reflected in both the language, See 12 U.S.C. § 1759(d)(2), and legislative history of the CUMAA. See H.R. Rep. 105-472, at 19; S. Rep. No 105-193, at 7; see also H.R. Rep. No. 105472, at 10 (identifying preservation of the common bond concept as a primary objective of the CUMAA). This provision of the NCUA's membership rule is therefore invalid. Chevron, 467 U.S. at 842-43.

b. IRPS 99-1 Violates the CUMAA By Encouraging Common Bond Groups Having Fewer Than 3,000 "Potential Primary Members" to Join Existing Credit Unions.

IRPS 99-1 violates the express intent of Congress by creating a presumption against the chartering of separately operating credit unions with fewer than 3,000 "primary potential" members. That presumption discourages the formation of separately chartered credit unions having fewer than 3,000 "primary potential" members and has the effect of making inclusion in a " multiple common bond credit union automatic for any common bond group having fewer than 3,000 primary potential" members. By discouraging groups having fewer than 3,000 members from forming separately chartered credit unions, and in fact making such additions automatic, IRPS 99-1 threatens the business interests of ABA member institutions by expanding both the number and size of conglomerate credit unions.

The CUMAA requires the NCUA in every instance to "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). The CUMAA does not provide an exception to this mandate for credit unions or

common bond groups with fewer than 3,000 members. To the contrary, its legislative history makes clear both that Congress did not intend for groups under the 3,000 member threshold to automatically qualify for membership in a multiple common bond credit union, H.R. Rep. No. 105-472, at 19 (it was not "intend[ed] for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union"), and did not, in adopting the 3,000 member limit, mean to indicate that groups with fewer than 3,000 members are incapable of forming separately chartered credit unions. Id. At 20 ("the 3,000 member figure is not intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions").

IRPS 99-1, however, establishes a regulatory presumption against the fori-nation of a separately chartered credit unions having fewer than 3,000 primary potential members. Specifically, IRPS 99-1 provides that "groups above the threshold of 3,000 primary members must be able to demonstrate why they cannot satisfactorily form a separate credit union," but requires that "[g]roups below the 3,000 threshold ... be able to demonstrate why they can successfully operate a credit union." 63 Fed. Reg. At 72001. Consequently, "a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than a proposed credit union with a larger field of membership in order to demonstrate that it is economically advisable and that it will have a reasonable chance to succeed." Id at 72000.

By creating a presumption against the formation of separately chartered credit unions having fewer than 3,000 "primary potential members," and subjecting such common bond groups to a potentially more stringent charter approval process, the NCUA, contrary to the

express requirements of the CUMAA, discourages (rather than encourages) the formation of separately chartered credit unions having fewer than 3,000 "primary potential members." The NCUA's presumption is therefore contrary to the intent of Congress, as expressed by and through the unambiguous language of 12 U.S.C. § 1759(f)(1)(A), and the House Committee Report, which specifically provides that "the 3,000 member figure is not intended to indicate that groups below 3,000 are incapable of forming new, viable credit unions." H.R. Rep. No. 105-472, at 20 (emphasis added).5/

In addition, the NCUA's presumption violates Congress' intent in enacting the CUMAA by having the effect of making common bond groups having fewer than 3,000 64primary potential" members automatically eligible for inclusion in already existing credit unions. Unless common bond groups having fewer than 3,000 "primary potential" members choose to, and are capable of, affirmatively rebutting the NCUA's presumption, they are automatically treated as having the trait necessary for being added to an already existing credit

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5/ **Previously, the NCUA had presumed that common bond groups having less than 500 -- not 3,000 -- members would be unable to form separately chartered entities, See 59 Fed. Reg. at 29079 (1994) ("While NCUA has not set a minimum size field of membership for chartering a federal credit union, experience has shown that a credit union with a proposed field of membership of under 500 generally is unlikely to succeed"); IRPS 99-1 tacitly acknowledges the effectiveness of that policy. 63 Federal Register at 72001 justifying the NCUA's policy change by contending that "[i]t would be remiss simply to say that, since a lower threshold number worked in the past, there is no need to change the economic advisability requirement today") (emphasis added). The NCUA's Chairman made similar representations to Congress, testifying that 500 -- not 3,000 -- was the minimum potential membership needed to form a safe and sound credit union. Cong, Hearing to Review the Supreme Court's Decision Regarding the Credit Union Common Bond Requirement and the Appropriate Congressional Response to the Ruling, Testimony of Norman D'Amours at I (March 11, 1998) [http:Hwww.house.govibanking/31198wit.htm] (stating that of the groups presently in multiple common bond credit unions "94.2 percent of them ... have fewer than the 500 potential members needed, as an absolute minimum, to organize and maintain a viable credit union").**

union -- ie., as being unable to operate as a separately chartered entity. Should the group choose not to challenge the NCUA's presumption, it will, by force of that presumption, be permitted to be included in the field of membership of an existing credit union. That effect is contrary to congressional intent, as reflected in the CUMAA's legislative history, which unambiguously provides that it was not "intend[ed] for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union." H.R. Rep. No. 105-472, at 19.

c. IRPS 99-1 Violates the CUMAA By Excluding Certain Members When Calculating the Size of a Common Bond Group For Purposes of the 3,000 Member Limit,

IRPS 99-1 violates the CUMAA by excluding "family" and "household" members when determining whether a common bond group or existing credit union falls below the 3,000 member threshold that limits eligibility for membership in multiple common bond credit unions. By counting only part of a group's membership when making that determination, IRPS 99-1 expands the number of groups and credit unions that qualify for membership in multiple common bond credit unions and thus damages the competitive interests of ABA member institutions.

The CUMAA provides that, subject to narrow exceptions, "only a group with fewer than 3,000 members shall be eligible to be included in the field of membership" of a multiple common bond credit union. 12 U.S.C. § 1759(d)(1). The statute does not provide that any members of the common bond group should be excluded when determining whether the group falls above or below 3,000 member limit.

IRPS 99-1 is contrary to the plain language of this membership limitation because it excludes certain persons who are members of the common bond group when determining the group's size for purposes of the 3,000 member threshold. IRPS 99-1 considers only "primary potential members" when determining the size of common bond groups that are already part of either a single or multiple common bond credit union (in the merger context), 63 Fed. Reg. At 72003 (allowing mergers of healthy credit unions that "contain[] select employee groups of less than 3,000 primary potential members"), and considers only "primary potential members" when determining the size of the charter applicants' common bond(s). Id. In both instances, the NCUA excludes from its calculation persons who are credit union members (or eligible for credit union membership) "on the basis of the[ir] relationship ... to another person who is eligible for membership in a credit union." 12 U.S.C. § 1759 (e)(1) (granting membership eligibility to "family or household members" "on the basis of the[ir] relationship ... to another person who is eligible for membership in the credit union").

These excluded "family" and "household" members are members of the common bond and potential members of any subsequent common bond credit union. They have full membership rights identical to those of so-called primary members, by both statute and regulation, and they are expressly considered members of the common bond group by NCUA rule. 63 Fed. Reg. at 72027 (listing among the "other persons sharing [the] common bond" of a given group "member[s] of the immediate family or household" of persons who are primary" members of the group). The NCUA's decision to exclude these members when determining whether the group has fewer than 3,000 members is arbitrary, capricious and an abuse of discretion and violates the unambiguous language of the CUMAA.

d. IRPS 99-1 Violates the CUMAA By Allowing the Merger of Financially Healthy Credit Unions Having Dissimilar Common Bonds.

The CUMAA requires the NCUA to encourage the formation of separately chartered credit unions and generally does not permit the formation of multiple common bond credit unions having groups of more than 3,000 members. IRPS 99-1 disregards these statutory requirements by allowing the merger of financially sound credit unions having dissimilar common bonds even where the separate merging entities are comprised either entirely or in part of common bond groups with more than 3,000 members. By exempting these mergers from the membership restrictions of the CUMAA, IRPS 99-1 damages the interests of ABA member institutions by allowing for an expansion in the number and size of multiple common bond credit union not intended by Congress.

The CUMAA provides that the NCUA is to "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union," 12 U.S.C. § 1759(f)(1)(A), and generally does not allow the formation of multiple common bond credit unions consisting in whole or in part of common bond groups having more than 3,000 members. Ld, § 1759(b)(2). The statute's membership restrictions apply equally to both the formation of new multiple common bond credit union charters through the merger of existing credit unions, and formation of new multiple common bond credit unions through the incorporation of common bond groups that did not previously belong to any federal credit union.

See. e.g., H.R. Rep. No 105-472, at 19 (noting that the statutory exceptions to the 3,000 member limit "apply where the Board has sufficient evidence to support a finding that creation of a separately chartered credit union, or the continued operation of an existing credit union, present safety and soundness concerns"). Id. (emphasis added); S. Rep. No. 105-193, at 7 (same).

IRPS 99-1 permits two financially sound credit unions to merge and form a new multiple common bond credit union consisting either in whole or in part of common bond groups having fewer than 3,000 "primary potential" members. See 63 Fed. Reg. At 72003 (allowing mergers of healthy credit unions that "contain[] select employee groups of less than 3,000 potential primary members"). The NCUA allows such mergers even though, by definition, they involve credit unions that can -- and in fact do -- operate safely and soundly as separately chartered entities; and the NCUA permits such combinations even where the two credit unions consist in whole or in part of common bond group(s) having more than 3,000 (but less than 3,000 49 potential primary") members. Id.

The NCUA's treatment of mergers of financially sound credit unions violates the plain and unambiguous requirement that the NCUA must "encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). Here, the NCUA does not encourage the chartering of separate credit unions but instead permits credit unions that are operating separately on a safe and sound basis to combine

and create new multiple common bond credit unions. The NCUA's rule is, in this respect, both contrary to the requirements of the CUMAA and arbitrary, capricious and an abuse of agency discretion.

e. IRPS 99-1 Violates the FCUA By Not Requiring That Existing Credit Unions Be Located "Within The Reasonable Proximity" of the Common Bond Groups They Are Absorbing,

IRPS 99-1 violates the CUMAA's geographic limitation on the formation of multiple common bond credit unions by permitting an existing credit union that is not "within reasonable proximity" of a common bond group to add that common bond group to its field of membership. IRPS 99-1 damages the competitive interests of ABA member institutions by easing the geographic limitation placed by the CUMAA on the formation and growth of multiple common bond credit unions.

The CUMAA provides that an existing credit union must where practicable be located "within reasonable proximity" of any common bond group being added to its field of membership. 12 U.S.C. § 1759(f)(1)(B). The CUMAA does not expressly define the phrase "reasonable proximity," but its legislative history makes clear that by including the "reasonable proximity" requirement, Congress intended to provide a strict geographic limitation on the formation and growth of multiple common bond credit unions. As the Report of the House

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6/ **This violation is made worse when coupled with the NCUA's policy of counting only "potential primary members" when determining the size of the merging credit union's common bond group(s). Taken together, these rules disregard one of the CUMAA's most fundamental principles by permitting a financially successful "group with [more] than 3,000 members ... [to] be eligible to be included in the field of membership" in a multiple common bond credit union. 12 U.S.C. § 1759(d)(1).**

Banking and Financial Services Committee explains, the CUMAA “articulates a strong policy towards placing groups which cannot form their own credit unions with a local credit union" because "the Committee believes that credit union members who live, work and interact in the same geographic area are likely to have more of a meaningful affinity and common bond than those who do not." H.R. Rep. No. 105-472, at 20. Congressman LaFalce, who drafted this provision, likewise stressed that the "reasonable proximity requirement" was "extremely important" and should be "give[n] a conservative interpretation, allowing credit unions in larger cities to incorporate only common bond groups located within nearby sections of that city." 144 Cong. Rec. H7050 (daily ed. Aug. 4. 1998) (statement of Rep. LaFalce). Equally as important, the House and Senate Reports also make clear that a credit union "facility" -- which the IRPS 99-1 uses as the touchstone of its "reasonable proximity" test -- is "meant to be defined in the same way that the [NCUA] has defined "service facility, " that is, an automatic teller machine or similar device would not qualify." H.R. Rep. No. 105-472, at 19 (emphasis added); see also S. Rep. No. 105-193, at 7.

The NCUA does not give either "service facility" or "reasonable proximity" the meaning intended by Congress. IRPS 99-1 provides that a group is within "reasonable proximity" of the existing credit union where it is within the service area of one of the credit union's "service facilities." 63 Fed. Reg. at 72002. IRPS 99-1 then goes on to alter – and significantly broaden -- its previous definition of "service facility" by allowing it to include not only a "credit union owned branch" but also "a credit union owned electronic facility." Id. Under its prior field of membership rule, the NCUA had only considered as "service facilities" actual branches where a credit union member could "deal directly with a credit union representative." See 59 Fed. Reg. at 29078 ("A

credit union's service facility is a place where ...(1) Shares are accepted for members' accounts; (2) loan applications are accepted or loans are disbursed; (3) a member can deal directly with a credit union representative; and (4) the service provided is clearly associated with that particular credit union").

IRPS 99-1 violates the clear intent of Congress, as reflected in the CUMAA's legislative history. Congress plainly did not intend for the NCUA to broaden its definition of "service facility"; in fact, it specifically stated that it intended for the NCUA to retain its earlier definition of "service facility." 5= H.R. Rep. No. 105-472, at 19. Just as plainly, Congress did not intend for the NCUA's definition to include electronic devices "similar" to automated teller machines. Ld, IRPS 99-1 violates the FCUA by doing both. By these actions, the NCUA undermined Congress' intent that members of multiple common bond credit unions have the affinity that comes from members "liv[ing], work[ing] and interact[ing]" with one another. See H.R. Rep. No. 105-472, at 20.

Second. Violations of the CUMAA's Limitations on "Single" Common Bond Credit Unions

IRPS 99-1 as written violates the CUNLAA by allowing a "single" common bond credit union to be comprised of multiple employer groups having little or no meaningful affinity. By unlawfully expanding the membership limits on "single" common bond credit unions, IRPS 99-1 allows some employer groups to circumvent the membership limits on multiple common bond credit unions set forth in the CUMAA. That circumvention harms the competitive interests of ABA member institutions by facilitating the creation and growth of de facto multiple common bond credit unions.

The FCUA, as amended, retains the common bond concept originally adopted when the statute was first enacted in 1934 specifically limiting the membership field for single common bond credit unions. It does so by limiting "single common bond credit unions" to "one group that has a common bond of occupation or association." 12 U.S.C. § 1759(b)(1). The legislative history of the original FCUA makes clear that Congress intended for an "occupational common bond" to encompass only persons belonging to a single employer group. For example, Roy B ergengren, an early advocate of credit unions who was instrumental in Congress' drafting of the FCUA, testified that an occupational conunon bond would be "limited to a single employer":

Senator Bankhead:	Take clerks in the stores. Who [among the clerks] is eligible in the [common bond] group if you organize [a credit union] in Baltimore?
Mr. Bergengren:	Take, for instance, the Tennessee Coal, Iron & Railroad Co. In Birmingham, Ala. There we have the T.C.I. Credit Union.
Senator Bankhead:	*And is it limited to a single employee?*
Mr. Bergengren:	*Yes.*

Credit Unions: Hearinizs Before a Subcomm, of the Senate Comm, on Banking and Currency, 73d Cong., lst 13 at 24 (1933) (emphasis added) ("1933 Committee Testimony").

In retaining the common bond concept for single common bond credit unions, Congress intended to preserve to the fullest extent possible a meaningful affinity between credit union members. See. e.g., H.R. Rep. No. 105-472 at 10 (providing that one of the purposes of the CUMAA was to "preserv[e] the integrity of the common bond concept established by the Federal Credit Union Act.. ..").

IRPS 99-1 does not limit a "single" occupational common bond credit union to single employer groups. Specifically, IRPS 99-1 allows employees of two companies to be bonded together in a "single" occupational group where either (1) one of the companies has at least a 10 percent ownership interest in the other company or (2) the companies are "related to another ... .. such as a company under contract and possessing a strong dependency relationship with another company." 63 Federal Register at 72007.

These exceptions to a one-employer group policy allow a single common bond credit union to be comprised of multiple employer groups that have no meaningful interaction with one another or an alignment of interests. The exception made for a company holding a 10 percent ownership interest in another company would apply even where the 10 percent interest is a non-voting one held by a silent partner or a large institutional investor and would allow a single common bond credit union to include diverse, unrelated employer groups. For example, persons employed by the "Tiger" funds would be in the same "single" common bond as employees of Tricon Global Restaurants, the parent company of Kentucky Fried Chicken, Pizza Hut and Taco Bell, because the "Tiger" funds hold a 10.8% interest in Tricon. See Tiger Partnerships Acquire 10.8% Stake in Tricon Global Restaurants, The Orange County Register, Jan. 10, 1998, at C02 (attached as Exhibit I to the Mastrangelo Affidavit). Similarly, the "dependancy relationship" exception would allow large suppliers to be bonded with almost a limitless number of customers and service providers. For example, Microsoft could presumably be in the same "single"

common bond as nearly all makers of computer software and hardware, including those that have an adversarial relationship with Microsoft, and its outside law firms.7/

IRPS 99-1 violates the CUMAA by expanding membership in "single common bond credit unions" beyond the limits intended by Congress. The original drafters of the FCUA intended for occupational common bond credit unions to be confined to a single employer, see 1933 Committee Testimony at 24, and the Congress that amended that statute and carried over the "common bond" concept did so in part because it intended for credit unions to retain the cohesive membership and loyalty that comes with interaction and an aligning of interests. See, e.g., H.R. Rep. No. 105-472, at 20. IRPS 99-1 violates the intent of Congress by expanding membership in a single common bond credit union to include multiple employer groups that in many instances will have no meaningful interaction or even an alignment of interests.

Third: Violations of the CUMAA's "Grandfathering" Provision

IRPS 99-1 violates the requirements of the CUMAA by expanding the "grandfather" rights provided by the CUMAA beyond their statutory bounds. In so doing, IRPS 99-1 damages the interests of ABA member institutions by expanding the size of multiple common bond credit unions.

7/ **The NCUA's prior chartering policy expressly (and sensibly) disallowed companies having adversarial relationship from being part of the same common bond. See. e.g., 59 Fed. Reg. at 29076 ("[p]ersons working in the entertainment industry in California" are not part of a single common bond "since [their] firms compete with one another"). With limitations now placed on the formation of multiple common bond credit unions, however, that limitation on the formation of single common bond credit unions has been removed. See 63 Fed. Reg. At 72023 (excluding from the examples of impermissible single occupational "common bond" arrangements those that include competing firms).**

The CUMAA allows persons who are "member[s] of any group whose members constituted a portion of the membership any Federal credit union ... [to] continue to be eligible to become a member of that credit union, by virtue of membership in that group after [the date of enactment]," 12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added), regardless of their ability to otherwise meet the requirements for membership in that credit union. This exception, by its plain and unambiguous terms, applies only to persons who were members of the group on the date of enactment of the CUN4AA and who can therefore "continue" to be eligible for membership in the group's credit union.

IRPS 99-1 does not limit this grandfathering exception to persons who were members of the group on the date of enactment of the CUMAA. Instead, as the NCUA most clearly explained when proposing its new membership rule, the agency will allow "a member, or subsequent new member, of any group, whose membership constituted a portion of the membership of any federal credit union at the date of enactment, to continue to be eligible for membership in the credit union." 63 Fed. Reg. at 49169 (emphasis added).

The NCUA's membership rule violates the unambiguous requirements of the FCUA's grandfathering provision. It allows persons who were not members of "a group whose membership constituted a portion of the membership any federal credit union at the date of enactment" of the CUMAA -- and who therefore cannot "continue" to be eligible for membership in that credit union -- to nevertheless be eligible for membership in that credit union solely on the basis of their subsequent membership in the group. This approach dramatically expands the impact of the CUMAA's grandfathering provision, giving it a meaning never intended by Congress. For example, all future employees of the more than 150 occupational 29 groups that comprise the

membership of AT&T Family Federal Credit Union – whose membership policies were specifically declared unlawfully in the First National Bank case --would, under the NCUA's approach, have membership eligibility "grandfathered," even persons who became employees of these businesses decades after the enactment of the CUMAA.

2. The NCUA Promulgated and Approved IRPS 99-1 in Violation of the Requirements of the Administrative Procedure Act,

The ABA is likely to succeed on the merits of its claim that the NCUA violated the requirements of the Administrative Procedure Act by purporting make its new field of membership rule effective less than 30 days after its publication in the Federal Register. The agency's reliance on the "good cause" exception to the APA's notice-and-comment requirements is unwarranted. That exception applies only where the agency can point to a demonstrable emergency, see e.g., Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm' , 969 F.2d 1141, 1144 (D.C. Cir. 1992); Analysas Corp. v. Bowles, 827 F. Supp. 20, 23 (D.D.C. 1993), which the NCUA has not done, and cannot do, here.

The Administrative Procedure Act provides generally that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date. . . ." 5 U.S.C. § 553(d). The NCUA belatedly recognized, when it approved the December 22 version of the rule, that it had bypassed this aspect of the APA's notice-and-comment requirements. It then attempted to justify its decision by relying on the "good cause" exception to the APA.

The Courts of this Circuit have explained time and again that "exceptions to the provisions of section 553 'will be narrowly construed and reluctantly countenanced,'" American Fed, of Gov't Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 198 1) (quoting New Jersey v, Environmental Protection Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980)), and have repeatedly stated that the good cause exceptions can only be legitimately invoked in "emergency situations." Id. at 1158; see also Georgetown University Hosp, v. Bowen, 821 F.2d 750, 757 n. 11 (D.C. Cir. 1987) (noting that "§ 553(d) appears to only contemplate a narrow exception to the 30 day requirement for rules that, for good cause shown, must be given effect either immediately or upon promulgation, or in less than 30 days"), aff'd, 488 U.S. 204 (1988).

The NCUA cannot rely on the "good cause" exception here because it cannot demonstrate on this record that there is an "emergency" that justifies its decision to bypass the requirements of the APA.

First, the record makes clear that this rule is the product of ordinary, not emergency, rulemaking. This is not a case where the agency promulgated a rule under a congressionally imposed deadline, Asiana Airlines v. Federal Aviation Admin., 134 F.3d 393, 397 (D.C. Cir. 1998) ("Statutory language imposing strict deadlines, standing alone, does not constitute good cause under § 553 . . . ."), or under exigent circumstances. Rather, this is a case where the NCUA promulgated a rule deliberatively, permitted the public for 60 days to submit comments, and approved its final version more than a month later. Cf Ngou v. Schweike , 53 5 F. Supp. 1214, 1216-17 (D.D.C. 1982) (refusing to apply the "good cause" exception to § 553(d) where the Secretary proposed a rule for comment on December 11, 1981, approved the rule February 8, 1992, published the rule on March 12, 1982, and made the rule effective April 1,

1982, because the Secretary "had ample time" to meet the thirty day notification requirement and could not "bootstrap himself to a position of emergency based on his own dilatory conduct"). The NCUA was fully aware, during this entire period, of the circumstances that it now identifies as emergent; but the NCUA never, prior to issuing the December 22 revision to the new rule, suggested that this was an emergency rule or that its final version had any legal justification to be made effective less than thirty days after publication in the Federal Register.

Second, the NCUA's cited "harm," like the rulemaking process generally, is also ordinary. The NCUA states that the rule should be made effective on an expedited basis because existing credit unions, under the present regime, are denied the benefit of being able to add to their membership new groups having dissimilar common bonds. But the fact that some regulated entities will benefit from, or be harmed by, the adoption of a regulation is rather typical -- indeed, even inevitable. Courts have consistently rejected the notion that this kind of "harm" provides an agency with "good cause" for making a rule effective immediately. See, e.g., Tennessee Gas Pipeline Co., 969 F.2d 1141 (regulator's concern that industry will circumvent new regulatory requirements and inflict environmental damage was not "good cause" for purposes of the APA); Ngou, 535 F. Supp. 1214 (regulator's concern that regulated persons

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8/ While the amended FCUA does permit existing credit unions to add to their membership dissimilar common bond groups, the statute intends to make such additions the exception (not the rule) in part by commanding the NCUA to always "encourage the formation of separately charter credit unions." NCUA's reliance on this limited exception in arguing that an emergency exists that warrants dispensing with the requirements of the APA is curious.

would lose certain benefits if the rule was made effective after expiration of 553(d)'s thirty day period was not "good cause" for purposes of the APA).

B. The ABA Will Suffer Irreparable Injury If the Requested Relief Is Not Granted.

Unless the Court grants preliminary injunctive relief, members of the ABA will suffer irreparable damage.

First, the NCUA's membership rule unlawfully expands credit union membership and therefore creates unlawful competition for ABA member institutions that threatens their ability to do business with both existing and potential customers. Seg Chessen Decl. 1112-13, 16-17.[9/] It is elementary that interference with "the opportunity to maintain and develop relationships with existing and potential customers" constitutes irreparable harm and supports the issuance of a preliminary injunction. Duct-O-Wire Co. v. U.S. Crane. Inc., 31 F.3d 506, 509-10 (7th Cir. 1994); JAK Prods.. Inc. v. Wiza, 986 F.2d 1080, 1084 (7th Cir. 1993) (unlawful competition resulting from violation of covenant not to compete results in irreparable injury); Merrill Lynch. Pierce. Fenner & Smith. Inc, v. Bradii~y, 756 F.2d 1048, 1055 (4th Cir. 1985) (affirming injunction where plaintiff "faced irreparable, noncompensable harm in the loss of its customers"); see also Sears Roebuck & Co. v. Sears Fin, Network. Inc., 576 F. Supp. 857, 864 (D.C. Cir. 1983) ("Trademark infringement and unfair competition are, by their nature, activities that cause irreparable harm"). Damage suffered from business lost to unfair competition cannot

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9/ **Recognizing that this type of injury results in irreparable harm, Judge Jackson, in analogous circumstances, entered an order enjoining the implementation of an earlier NCUA membership rule.**

be completely remedied. See New York Pathological & X-Ray Labs., Inc. v. Immigration & Naturalization Sery., 523 F.2d 79, 81 (2d Cir. 1975) (irreparable results in cases involving loss of customers because "the Court would have no way to remedy the loss of business [plaintiffs] are now suffering"); see also Chessen Decl. at 16. That fundamental difficulty would be complicated here by the fact that complete relief would require the Court to "undo" field of membership expansions. See Unscrambling the Egg? Supply FCU Asks For Delay of De-Merger Plans with Defense Supp1y, Credit Union Times, July 15, 1998, (describing the problems associated with unraveling an illegal credit union merger) (attached as Exhibit J to the Mastrangelo Affidavit).

Second, with respect to its claim under the Administrative Procedure Act, ABA member institutions will suffer irreparable harm to their procedural rights unless a preliminary injunction is granted. Under the APA, the ABA and its member institutions are entitled to 30days notice to prepare for, or challenge, regulatory action. That 30 day period will be irretrievably lost if the IRPS 99-1 is permitted to take effect on January 1.

The harm to the ABA members is also imminent. The 30 day period provided for by the APA is already running so the harm caused by the NCUA's violation of the APA's procedural requirements is now occurring. The harm caused by the NCUA's substantive violations of the FCUA is also imminent as the NCUA is, according to recent press reports, rapidly and aggressively approving expansions to multiple common bond credit unions. See SEG Application Approvals Roll in Under Roukema's Watchful Eye, Credit Union Times Breaking News (Jan. 1, 1999) [http://www.cutimes.com./breaking_newsibrOI0599-l.html] (Web Page) ("As of January 4, 67 [select employee group] applications, filed under the new Chartering Manual (IRPS 99-1), have

been approved by two NCUA regions, according to agency spokesperson Lesia Bullock") (attached as Exhibit H to the Mastrangelo Declaration). That is not surprising. The NCUA has in the past moved quickly and aggressively in implementing new membership rules. For example, the NCUA approved over a dozen charter conversions under IRPS 96-2, a membership rule that the ABA immediately challenged (and this Court shortly thereafter invalidated), on the very day that the rule became effective. The NCUA's attempt to make this membership rule effective almost immediately on publication -- as it attempted to do with IRPS 96-2 -- sent a clear signal that it would move quickly here.[10/]

C. The NCUA Will Not Be Significantly Harmed If Relief Is Granted

The NCUA will not be significantly harmed by the granting of relief. A preliminary injunction will simply return the agency to its prior membership rule. Under that regime, the NCUA can continue to charter single common bond and community credit unions and credit unions are permitted to maintain their current members and enroll new members from existing common bond groups. The NCUA will only be prohibited from approving charter applications and amendments on the basis of those portions of its membership rule that are unlawful.

10/ The litigation regarding IRPS 96-2 is similar to this one in that there, like here, the ABA's challenge was based in part on an allegation that the rule had been adopted in violation of the requirements of the Administrative Procedure Act. In that case, Judge Jackson granted the ABA's motion from the bench and expressed concern that the NCUA, in violating the requirements of the APA, behaved as though it were a "rogue" agency.

D. The Public Interest Is Advanced by Granting Injunctive Relief

The public interest would plainly be served by the grant of preliminary injunctive relief that the ABA now seeks. As this Court has explained: "[T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the requirements of the APA. . . ." Patriot Inc. v. Department of Housin2 and Urban Development, 963 F. Supp. 1, 6 (D.D.C. 1997).

CONCLUSION

For the foregoing reasons, ABA respectfully requests that the Court enter a preliminary injunction preventing the NCUA from implementing IRPS 99-1

Respectfully submitted,

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Date: January 8, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,

Plaintiff,

V. **Civ. A. No. 99-0042 (CKK)**

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FQR PRELIMINARY INJUNCTION

Dated: Jan. 15, 1999

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INTRODUCTION

Citing only the specter of unspecified possible future harm to unidentified members of its association, the American Bankers Association ("plaintiff") asks this Court to issue a preliminary injunction forbidding the implementation of amendments to the Federal Credit Union Act, 12 U.S.C. § 1751, et se . ("FCUA"). Because plaintiff cannot satisfy any of the stringent requirements for issuance of the extraordinary relief it seeks, its request must be denied.

This case concerns the appropriate "field of membership," or size, of federal credit unions and is the latest chapter in ongoing litigation and congressional action on this issue. In National Credit Union Administration V. First National Bank & Trust Co., -- U.S. --, 118 S. Ct. 927 (1998)("First National"),the Supreme.Court disapproved of certain policies of the National Credit Union Administration ("NCUA") concerning membership in federal credit unions. In August 1998, Congress abrogated First National by amending the FCUA to incorporate these NCUA policies. See Federal Credit Union Membership Access Act of 1998, P. L. 105-219, Title I. §§ 101-103, 112 Stat. 914, 917, codified at 12 U.S.C. § 1759 ("Act").1/

1/ **A copy of the Act (as codified) is attached hereto as Exhibit A for the Court's convenience.**

The cardinal principle underlying membership in federal credit unions is that groups with a "common bond" of occupation or association are best positioned to operate safe and secure, fiscally responsible credit unions. Because many such groups lack sufficient numbers-or resources to form a credit union on their own, the NCUA,-prior to First National, allowed these groups to join together in "multiple common-bond credit unions-,, Multiple common-bond credit unions consist of different groups, each of which shares its own common bond, while single common-bond credit unions involve only one such group.

Of primary importance, the Act expressly authorized chartering multiple common-bond credit unions. In so doing, Congress provided that a group with fewer than 3,000 potential members would be eligible to join a multiple common-bond credit union. If the group's membership exceeds 3,000, however, Congress provided that the group could be added to a multiple common-bond credit union if the NCUA determined, inter alia, that it would not be feasible to charter the group as a single common-bond credit union. As directed by Congress, the NCUA fleshed out these statutory standards in regulations published in, final form on December 30, 1998. See Organization and operation of Federal Credit Unions; Final Rule, 63 Fed. Reg. 71,998, et seq. (Dec. 30, 1998)("Final Rule").2/

2/ **A copy of the Final Rule is attached hereto as Exhibit B for the Court's convenience.**

Plaintiff's primary complaint lies with aspects of the Final Rule governing chartering and addition of new groups to multiple common-bond credit unions. This focus is unsurprising as banks obviously would prefer that the NCUA charter financially weak federal credit unions rather than stronger ones that potentially could compete more successfully with banks and other financial institutions. The NCUA, however, is charged by Congress with ensuring the fiscal security of federal credit unions and the solvency of the National Credit Union Share Insurance Fund ("NCUSIF"). In the Final Rule, the NCUA has acted consistently with these duties, as we 11 as the provisions of the Act, by promulgating reasoned and sound regulations on multiple common-bond credit unions. Accordingly, plaintiff is highly unlikely to succeed on the merits of this claims. For similar reasons, plaintiff is unlikely to prevail on its contentions that certain multiple common-bond credit unions should not be allowed to merge or expand, that single common-bond credit unions not be chartered if they consist of subsidiaries that lack a strong affinity to one another and that group membership be counted in a manner other than that stated in the Final Rule.

Even if it could demonstrate the required strong likelihood of success on the merits, however, plaintiff has not shown that its members will suffer irreparable harm in the absence of the requested emergency injunctive relief. Although it chants the mantra of potential competitive injury to banks from federal credit unions chartered under the Final Rule, plaintiff has not and cannot point to any newly-expanded credit union that currently

causes any irreparable injury to its members' interests. Under these circumstances, plaintiff falls far short of carrying its burden of showing actual, imminent injury to its members. Finally, both the interests of third parties, including groups seeking to charter or join credit unions, and the public interest would be disserved by issuance of emergency injunctive relief.

A. Statutory and Regulatory Background

1. Statutory Background

Under, the FCUA, federally-insured credit unions can organize and provide, inter alia, financial services to their members. See First National, 118 S. Ct. at 930. Prior to 1998, § 1759 of the FCUA provided that:

> [f]ederal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural association.

Id. Beginning in 1982, the NCUA permitted federal credit unions to be composed of multiple, unrelated groups provided each such group had its own common bond of occupation or association. See The Supreme Court, however, invalidated this practice in First National, holding that this interpretation violated § 1759. See id. at 938-40.

In response to First National and after holding extensive hearings, Congress voted overwhelmingly to amend the FCUA by adopting the Act.[3/] See H. Rep. No. 105-472,

105th Cong. , 2d Sess. (March 30, 1998)("House Report") at 13 ("A legislative response was called for to address issues that arose as a result of the Supreme Court's decision"), 13-14 (listing hearing witnesses, including a representative of plaintiff)[4]; S. Rep. No. 105-193, 105th Cong., 2d Sess. (May 21, 1998)('Senate--Report") at 2-3 (to same effect, and listing plaintiff's representative as a witness).[5] In relevant part, the Act defines three types of "membership fields": single common-bond credit unions, multiple common-bond credit unions, and community, credit unions. As Congress further explained:

> Credit union members in the occupational category are employed by the same enterprise, or in the same trade. An associational common bond is available to groups of individuals who participate in activities that develop common loyalties, mutual benefits, and mutual interests.

House Report at 18.

The legislative history to the Act clearly states that Congress's purpose was to overrule First National by "ratify[ing] the longstanding policy of the [NCUAI with regard to field of

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[3] **Plaintiff repeatedly characterizes the Act as narrow, compromise legislation, but offers no support for this proposition. To the contrary, the Act represents a swift, decisive and unambiguous congressional response to First National.**

[4] **A copy of the House Report is appended hereto as Exhibit C for the Court's convenience.**

[5] **A copy of the Senate Report is appended hereto as Exhibit D for the Court's convenience.**

membership in Federal credit unions. " House Report at 1. Congress manifestly did not intend to do away with multiple common-bond credit unions. See House Report at 1 (purpose of legislation "is to ensure the continued safety and soundness of credit unions by permitting multiple common-bond formation"), at 18 ("The Committee has determined that it is appropriate to change existing law and specifically authorize multiple common-bond federal credit unions.").

As noted above, a single common-bond credit union is comprised of "[o]ne group that has a common bond of occupation or association 1759(b)(1). Congress defined a multiple common-bond credit union as consisting of:

> More than one group --
>
> (A) each of which has (within the group) a common bond of occupation or association; and
>
> (B) the number of members, each of which (at the time the group first included within the field of membership of a credit union described in this paragraph) does not exceed any numerical limitation applicable under subsection (d).

Subsection (d), which is titled "multiple common-bond credit union group requirements," and governs formation of such credit unions provides:

> (1) Numerical limitation - Except as provided in paragraph (2), only a group with fewer than 3,000 members shall be eligible to be included in the field of membership of a credit union described in subsection (b)(2).

This numerical limitation is, however, subject to several broadly-drafted, separate exceptions:

> In the case of any Federal credit union, the field of membership category of which is described in subsection (b)(2), the numerical limitation in paragraph (1) of this subsection shall not apply with respect to --
>
> > (A) any group that the [NCUAI determines, in writing and in accordance with the guidelines and regulations issued under paragraph (3), could not feasibly or reasonablv establish a new single common-bond credit union, the field of membership category of which is described in subsection (b)(1) because --
> >
> > > (i) the group lacks sufficient volunteer and other resources to support the efficient and effective operation of a credit union;
> > >
> > > (ii) the group does not meet the criteria that the [NCUA1 has determined to be important for the likelihood of success-in establishing and managing a new credit union, including demographic characteristics such as geographic location of members, diversity of ages and income levels, and other factors that may affect financial viability if union; or
> > >
> > > (iii) the group would be unlikely to operate a safe and sound credit union. (Emphasis added.)

By allowing these exceptions to the numerical limit of § 1759(d)(1) to apply to "any" multiple common-bond credit union, see § 1759(d)(2) above, Congress determined that new groups exceeding 3,000 primary potential members could be added to such credit unions. Congress's overriding concern in adopting these exceptions was to ensure chartering of viable, stable credit unions. See House Report at 10, 11 (Act designed to ensure safety and soundness of multiple common-bond credit unions where stand-alone credit union would not be "viable",); Senate Report at 7 (where group "lacks sufficient

financial resources, volunteers or operational capacity" to form a single common-bond credit union it "is unlikely to operate a safe and sound credit union."). Congress specifically directed the NCUA to adopt regulations, explaining the criteria that it would use to exercise its discretion to assess whether a group with more than 3,000 potential members met these standards. See § 1759(d)(3).

Congress also authorized the NCUA to approve expansion of multiple common-bond credit unions through the addition of groups, regardless of the groups size. Subsection (f) of the statute states:

> (1) In general - The [NCUA] shall
>
> > (A) encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union whenever practicable and consistent with reasonable standards for the safe and sound-operation-of a credit union, and
> >
> > (B) if the formation of a separate credit union by the group is not practicable or consistent with the standards referred to in subparagraph (A), require the inclusion of the group in the field of membership of a credit union that is within reasonable proximity to the location of the group whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union. (Emphasis added).

Finally, in a "grandfather" clause, Congress expressly provided that these limitations would not apply to currently-constituted multiple common-bond credit unions: Notwithstanding subsection (b) --

> (i) any person or organization that is a member of any Federal credit union as of August 7, 1998 may remain a member of the credit union after August 7, 1998; and
>
> (ii) a constituted Federal member of any group whose members a portion of the membership of any credit union as of August 7, 1998 shall continue to be eligible to become a member of that credit union, by virtue of membership in that group, after August 7, 1998.

1759(c)(1)(A). The Senate Report explained, as relevant here, that this provision provided that:

> any individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and <u>any new member of such group is also eligible.</u>

Senate Report at 7 (emphasis added). See also House Report at 19 (provision grandfathered "anyone who is or becomes a member of a group representing a portion of the credit union's membership, may remain members or eligible members of that credit union.") (emphasis added).[6/]

[6/] **This provision continued the membership and eligibility practices in place under this Circuit's partial stay of the district court's injunction issued by the District Court following the decision in <u>First National Bank and Trust Co. v. National Credit Union Administration,</u> 90 F.3d 525 (D.C. Cir. 1995), affirmed <u>by First National.</u>**

2. Regulatory Background

The NCUA issued proposed regulations to implement the Act on August 31, 1998, which were published in the Federal Register on September 14, 1998. See Organization and Operation of Federal Credit Unions; Proposed Rule, 62 Fed. Reg. 49,164. During the comment period, the NCUA received 369 comments from a variety of individuals and organizations. Final Rule, 63 Fed. Reg. At 71,998. Based on a finding of "good cause" and because the Final Rule removes restrictions placed on credit unions, the Final Rule became effective on January 1, 1999,[7/] with the exception of provisions concerning the definitions, of "immediate family member or household" and "well-defined local community, neighborhood or rural district." See id. at 72,017.[8/]

a. Standards for Adding Groups to Multiple Common-Bond Credit Unions

In adopting the Final Rule, and specifically concerning creation of new multiple common-bond credit unions, the NCUA expressly reaffirmed its adherence to Congress's stated preference for separately chartered credit unions:

7/ The basis for the NCUA's finding of "good cause" to truncate the time period between the publication of the Final Rule on December 30, 1998, and its effective date was set forth in the Final Rule: '[t]he Board believes that credit unions are continuing to be harmed by the inability to add new groups." Id. at 72,017. The NCUA also balanced other interests against this need to expedite the effective date: "any benefit of delaying the, effective date is outweighed by the harm to credit unions." 1d.

8/ Plaintiff does not challenge these provisions in their motion for preliminary injunction. See Plaintiff's Memorandum at 4, n. 2 & 8, n. 4.

it is the Board's intent that any group that can meet the

> economic advisability requirements should form its own credit union . . . Every effort will be made to encourage new charters.

See 63 Fed. Reg. at 72,001. The NCUA noted, however, that its experience showed that the smaller the group, the more difficult it was for it to form a successful credit union. See id. Consistent with its long-standing practice, the NCUA stated that it must closely examine the viability of a request for a separate charter by a group to determine whether such a group could support a fiscally stable credit union. See jd. at 72,001 (the NCUA "will evaluate the economic advisability of the proposed institution or expansion").

Of great importance here, the Final Rule states that a credit union can have fewer than 3,000 potential primary members and still be approved as a single common-bond credit union. See id. ("The Board's view is that the 3,000 primary potential membership threshold is . . . not an absolute requirement"). Furthermore, this numerical requirement:

> is not intended to undermine the statutory requirement to encourage the formation of new credit unions . . . Any group desiring to form its own credit union will be given every opportunity to demonstrate that it has met the economic advisability requirements.

Id. See also id.("the 3,000 primary potential member threshold is not an absolute, but simply a threshold"). To the contrary, the regulation simply states that:

> a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than a proposed credit union with a larger field of membership in order to demonstrate that it is economically advisable and that it will have a reasonable chance to succeed.

Ensuring the fiscal integrity of credit unions is critical as [f] ailure to do so would put the National Credit Union Share Insurance Fund (NCUSIF) at risk." Id. at 72,001. As the Final Rule states, the NCUA:

> believes it must not only encourage new charters, but also ensure to the fullest extent possible that those groups receiving a separate charter will have a reasonable basis for success and thereby avoid unnecessary risk to the NCUSIF.

Id

The NCUA cautioned, however, that "based on historical data and evidence of economic viability, [] a credit union with fewer than 3,000 primary potential members . . . may not be economically advisable." Id. at 72,000.[9/] As the NCUA. As the NCUA emphasized, many existing smaller credit unions are viable, but "at the time of their charter, economic conditions and the financial service expectations of credit union members were different" than today's environment." Id. at 72,001. Indeed, [i]t would be remiss simply to say that, since a lower threshold worked in the past, there is no need to change the economic advisability requirement today." Id.

9/ **The Final Rule defines "primary potential" members to include, by way of example, "employees of a corporation or members of an association." Id.**

Therefore, the Final Rule states that the NCUA will examine every group desiring to be added to a multiple common-bond credit union to assess "whether it has the capability and desire to support an independent operation." Id. This analysis "is the intent of the [Act]," id., but, as required by Congress, independent chartering "must be balanced with operational feasibility." U. See also 12 U.S.C. § 1759(f)(1)(A)(credit unions shall be permitted to expand [w]henever practicable consistent with reasonable standards for the safe and sound operation of a credit union"). Accordingly, the NCUA will consider:

> the desire and intent of the group and the sponsor support. In other words, to ignore the group's administrative capability may lead to unnecessary supervisory problems in the future. While the intent of the group and sponsor support cannot be ignored and will carry great weight, they are not the sole factors.

Id.

b. "Reasonable Proximity" Requirements

Regardless of whether the group has more or less than 3,000 primary potential members, the Act authorizes multiple common-bond credit unions to add groups with dissimilar common bonds provided the credit union is located "within reasonable proximity to the location of the group whenever practicable." 12 U.S.C. § 1759(f)(1)(b). The legislation provides no further definition of this concept. The Final Rule determined that Congress intended reasonable proximity to be a

> geographic limitation . . . the group to be added must be within a reasonable proximity geographically to the credit union . . . That is, the groups must be within the service area of one of the credit union's service facilities.

63 Fed. Reg. at 72,002. The regulation also adopted a common sense approach to "service area," finding that this term "means that a member can reasonably access the service facility.,, Id. This concept is a flexible one, emphasizing the ability to provide service to the group, as the reasonableness of access varies, e. g. , between urban and rural areas. See id. at 72, 002-03. A "service facility" includes a credit union owned branch, a shared branch, a mobile-branch that goes to the same location on a weekly basis," and an electronic facility (but expressly does not include an automatic teller machine ("ATM")).Id. at 72,003.

C. "Grandfathered" Membership Standards

As noted above, in the Act Congress provided that members of groups that were, prior to August 7, 1998, within the field of membership of a credit union would "continue to be eligible" to join the credit union by virtue of the membership of their group. See 12 U.S.C. § 1759(c)(1). In the Final Rule, the NCUA correctly noted that the Act:

> permits a member, or subsequent new member, of any group whose members constituted a portion of the membership of any federal credit union at the date of enactment, to continue to be eligible for membership in the credit union.

63 Fed. Reg. at 72,015 (emphasis added).

d. Rules Governing Voluntary Mergers of Multiple Common-Bond Credit Unions

Multiple common-bond credit unionscan grow either by adding new groups, as discussed above, or by merging with another credit union. Accordingly, from time to time, existing and financially sound multiple common-bond credit unions ask the NCUA's permission t-o-merge. A merger involves combining the two separate credit unions with only one surviving as a continuing entity. The Act is silent on whether the numerical limitation of § 1759(d)(1) and the exceptions to that limitation in § 1759(d)(2) apply to voluntary mergers. The NCUA determined, however, that for:

> credit unions seeking to merge containing groups with 3,000 or more members, the provisions of [§ 1759 (d)(2)(A)] of the [Act] must be met or the groups in excess of 3,000 will have to be spun off in order for the merger to proceed.

Id. The agency reached this conclusion after balancing the fact that [m]erging credit unions is crucial to the entire credit union system and helps reduce the risk to the NCUSIF," id., against its "responsibility to assure mergers are consistent with the statutory requirements of the [Act] and that they do not weaken credit unions or increase risk to the NCUSIF." Finally, the NCUA concluded that mergers involving multiple common-bond credit unions where the merging credit union did not groups with 3,000 or more members did not have to satisfy the numerical limitation of the Act:

> [a]though Congress could have done so, it did not include any language discussing or limiting NCUA's ability to authorize the merger of existing multiple common-bond credit unions containing groups with less than 3,000.

Id. at 72,003. See also House Report at 19 (making no mention of subjecting credit unions containing groups with less than 3,000 members to the numerical limitation of the Act) .

e. Rules Allowing Single Occupation Common-Bond Credit Unions to Include Subsidiaries

In the Final Rule, the NCUA stated that, under defined circumstances, "a federal credit union may include in a single occupational common bond all persons and entities who share the common bond without regard to geographic location." 63 Fed. Reg. at 72,007. This provision, or its substantially identical predecessors, has been part of the NCUA's regulations for years and reflects the agency's long-standing policy that employees in an entity, the entity's subsidiaries and the entity's dependent contractors share a common bond.[10/]

The NCUA therefore republished its existing rule on common bonds between employees of a company and employees of a contractor dependent on the company:

10/ Plaintiff could not dispute that credit unions both historically and today are largely employer-based. Moreover, as Justice Thomas recognized in First National, employees of subsidiaries of the same company share a common bond. See First National, 118 S. Ct. at 938 ("a 'common bond' exists when employees of different subsidiaries of the same company are joined together in a federal credit union").

> [e]mployment in a corporation or other legal entity which is related to another legal entity (such as a company under contract and possessing a strong dependency relationship with another company) makes that person part of an occupational common bond of employees of the two entities.

63 Fed. Reg. at 71,007. The agency determined, however, to adopt a more restrictive approach than its prior policy, and required that one company own at least 100-. of the stock of the other company before a common bond was established for purposes of a single common-bond credit union:

> Employment in a corporation or other legal entity with an ownership interest of not less than 10 percent in or by another legal entity makes that person part of an occupational common bond of employees of the two legal entities.

Id. In this regard, the Final Rule noted that certain federal regulations recognize an entity's ownership of 10% of the stock of a company creates a rational presumption that the entity controls the company. Id. With respect to both of these bases for finding a common bond, the NCUA noted that this Circuit in its decision in First National recognized that the agency had broad discretion to define common bond requirements more expansively than it did at that-time (and continued to do until publication of the Final Rule). See id. See also First National Bank and Trust Co. v. National Credit Union Administration, 90 F.3d 525 at 525-26. Given this Circuit's view that "the mere element of resemblance or common characteristic", was sufficient to find a common bond, the NCUA determined that these new

standards for recognizing a single occupational common bond were well within its discretion. See id.

ARGUMENT

A. Plaintiffs, Motion for Preliminary Injunction Should Be Denied

1. Standards for Issuance of Preliminary Injunction

Preliminary injunctive relief is "a drastic and unusual judicial measure." Marine Transport Lines, Inc. V. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985). A party may obtain this "extraordinary" remedy, Public Citizen v. National Advisory Committee, 708 F Supp 359, 362 (D.D.C. 1998), aff'd 886 F. 2d 419 (D.C. Cir. 1989, only if it demonstrates that: (1) it has a substantial likelihood of succeeding on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if injunction is granted; and (4) the public interest will be furthered by the injunction. See, e.g., Smith, Bucklin & Associates v. Sonntag, 83 F. 3d 476, (D.C. Cir. 1996); Sea Containers Ltd. v. Stena AB, 890 F. 2d 1205, 1208 (D.C. Cir. 1989). A plaintiff making only a minimal showing of irreparable harm must demonstrate a high probability of success on the merits. See, e.g., CityFed Financial Corp v. Office of Thift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)(where showing of factor in preliminary injunction test is weak, strong showing on other factors must compensate).

2. Plaintiff Is Unlikely to Succeed on the Merits Because the Provisions of the Final Rule Challenged by Plaintiff Are Consistent with the Act and Entirely Reasonable

Plaintiff contends that the contested provisions of the Final Rule violate the APA because they allegedly are contrary to the Act and are arbitrary and capricious. See Complaint, 21-46. Plaintiff is highly unlikely to succeed on its claims because they are without merit.

Under the APA, agency action only may be set aside if it was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706 (.2). Under these standards, the agency's decision is entitled to a presumption of regularity, see,, e.g., Citizens to Preserve Overton Park, 401 U.S. 402, 415 (1971), and [t]he burden of overcoming the presumption of validity is on the party seeking review." Sierra Pacific Industries v. Block, 643 F. Supp. 1256, 1266 (N.D. Cal. 1986).

This standard of review also is highly deferential; the agency's action must be upheld if rationally based. See, e.g., Motor Vehicle Mfrs, Ass'n of the United States, Inc. v, State Farm Mut. Auto. Ins, Co,, 463 U.S. 29, 43 (1983); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). The Court may not substitute its judgment for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 416.

Furthermore, where, as in this case, the government's regulation purportedly conflicts with a statute, the Court is guided by the teachings of Chevron U.S.A., Inc, v, Natural Resources Defense Council. Inc., 467 U.S. 837 (1984)("Chevron") arid its progeny. Under Chevron, courts examine whether an agency's interpretation of a statute administered by that agency is consistent with express congressional intent or, in the absence of clearly expressed intent, is reasonable:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

Chevron, 467 U.S. at 842-43.

Thus, under Chevron, the reviewing court's "first job is to . . .determine congressional intent, using traditional tools of statutory construction." Dole v. United steelworkers; 494 U.S. 26, 35 (1990)(quoting National Labor Relations Board v. Commercial Workers Union, 468 U.S - 121, 125 (1987)). The "starting point" of that inquiry necessarily "is the language of the statute itself." Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 5 (1985).

Where the court concludes that Congress has not spoken directly and unambiguously to a specific question, the agency's interpretation of the statute should be upheld if it "is based upon a. permissible consr-ruction of the statute." See Chevron, 467 U.S. at 842-43. An agency's interpretation is "permissible" if it is "rational and.consistent with the statute." National Labor Relations Board v. Food and Commercial Workers, 484 U.S. 112, 123 (1987). In this regard, a statutory interpretation by the agency charged with administering the statute is entitled to considerable deference." Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985).

A review of plaintiff's contentions under these very deferential Chevron standards demonstrates that plaintiff is highly unlikely to' succeed on the merits of its claims because the challenged provisions of the Final Rule are entirely consonant with the Act and are reasonable.

a. Provisions Governing Approval of Charters and Expansion of Multiple Common-Bond Credit Unions

Plaintiff complains that the Final Rule's provision governing approval of charters for and expansion of multiple common-bond credit unions violates the plain language of the Act and is unreasonable. Plaintiff offers three specific alleged defects in the regulation:

(1) the NCUA cannot consider a group's interest or lack thereof about forming a single common-bond credit union (as opposed to its desire to Join a multiple common-bond credit union) when assessing whether the group

likely would operate a safe and sound, efficient and effective, successful single common-bond credit union, see Plaintiff's Memorandum at 13-16; (2) the Final Rule improperly creates a "presumption" against chartering single common-bond credit unions if the group has less than 3,000 primary potential members, see id. at 16-19; and

(3) certain family members of primary potential members of a group should be counted to determine whether the group has more than 3,000 potential members. See id., 19 - 2 0.

First-Alleged Defect: The Act on its face does not explicitly address whether the NCUA can or cannot take into account, as one factor among many, the desire of a group not to form a single common-bond credit union. Therefore, the first step of the Chevron analysis is not dispositive and the Court should assess whether the Final Rule is merely reasonable.

Under this second prong of the Chevron analysis,. there can be no question that the NCUA properly may consider the interest of a group in forming, funding, operating and managing its own single common-bond credit union rather than joining an established, larger multiple common-bond credit union. Indeed, the Act provides the NCUA with extraordinarily broad discretion to consider any and all factors that demonstrate that a group "could not feasibly or reasonably establish a new single common-bond credit union." 12 U.S.C. § 1759(d)(2)(A). Among the specific reasons for

not allowing such a group to form this type of credit union is that "the group lacks sufficient volunteer and other resources to support the efficient and effective operation of a [single common-bond] credit union." § 1759(d)(2)(A) (i) (emphasis added).[11/] Similarly, Congress has directed that the NCUA 'shall" consider whether, for any reason, "the group would be unlikely to operate a safe and sound credit union." 1759 (d) (2) (A) (iii).[12/]

The Final Rule also correctly interprets the directives of the Act to require consideration of the willingness of the group to start, run and manage its own single common-bond credit union:

> As the legislation directs, the [NCUA1, will encourage the formation of separately chartered credit unions if it is prudent and economically advisable. Important factors in making this determination, however, are the desire and intent of the group and the sponsor support. In other words, to ignore the group's administrative capability may lead to unnecessary supervisory problems in the future.

63 Fed. Reg. at 72,002. See also id. at 72,001 ("The [NCUA]'s intent is that every group being added to a multiple common-bond

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[11/] **Congress's specific reference to the importance of volunteers recognizes the critical role volunteers play in the formation and operation of federal credit unions. As stated in the preamble of the Act, credit unions are "member-owned, democratically operated, not-for-profit organizations generally managed by volunteer board of directors." P.L. 105-219, 112 Stat. 914 at § 2(4). In fact, as plaintiff presumably would not contest, the Board of Directors of a federal credit unions must be staffed by volunteers, only one of whom may be paid a salary. See 12 U.S.C. § 1761(c).**

[12/] **Unsurprisingly, plaintiff does not contend that the NCUA should not consider a group's "desire" when that desire is to obtain a separate charter. Consideration of this factor only is impermissible, plaintiff presumably believes, where the desire is in the other direction. Plaintiff cannot have it both ways.**

credit union-should be analyzed to determine whether it has the capability and desire to support an independent operation."). Unquestionably, consideration of the group's ability and interest in being separately chartered is vital to reaching a decision regarding whether the group, if separately chartered, will operate a solvent, efficient, successful credit union. This analysis also is entirely consistent with ensuring that "groups a separate charter will have a reasonable basis for success and thereby avoid unnecessary risks to the NCUSIF." Id. at 72,001.[13/] Under plaintiff's view of the Act, however, the NCUA would be compelled to charter an unwilling group-separately, irrespective of the group's commitment to operating a credit

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[13/] **Plaintiff claims that the Act requires the NCUA cite "tangible, objective evidence" regarding a group's ability to operate a separately chartered credit union. Plaintiff's Memorandum at 15. There is no such requirement in the Act, and the agency certainly is free to rely on its own experience –both objective and subjective -- with the formation and functioning of credit unions in making chartering decisions. Indeed, only § 1759(d)(2)(A)(ii) provides a listing -- which does not purport to be exhaustive -- of factors that the NCUA should consider when deciding whether to charter larger groups as single or multiple common-bond credit unions under that provision; the other two subsections provide no such guidance at all. The NCUA therefore can identify and apply any other factors that it believes are relevant to the chartering decision.**

union on its-own.[14/] This position, not that stated in the Final Rule, is unreasonable.

As the virtually unrestricted language chosen by Congress its mandate to the NCUA demonstrates, the NCUA can, and should, consider all factors, and assign those factors whatever weight is sees fit, in making these determinations. In view of the NCUA's vital responsibility for safeguarding the health of federal credit unions and the NCUSIF, this wide latitude is especially appropriate. Because the provisions of the Final Rule permitting the NCUA to consider the level of commitment of a group to forming its own credit union plainly are not contrary to the Act and fully comport with common sense, these provisions easily pass muster under the APA.

Second Alleged Defect: The Act on its face makes no express mention of "presumptions" about separately chartering new groups based on the number of their primary potential members. The Act does, however, clearly state that groups with less than 3,000

[14/] Plaintiff also contends that the NCUA should not pay any heed to cumentation from the head of the sponsor of a group regarding the group's disinclination to form its own-credit union. See Plaintiff's Memorandum at 15. Again, the interest of the sponsor, including its employees, in supporting a stand-alone credit union rather than joining an existing, established multiple bond credit union cannot reasonably be ignored by the NCUA. As plaintiff certainly would not contest, the sponsor of a single bond credit union provides substantial support to its employees in connection with a credit union. See. e.g., 63 Fed.Reg. at 72,053 (listing, on NCUA form, facilities and assistance that sponsor may agree to provide, including office space and supplies, making payroll deductions and payment of start up costs). In any event, the Final Rule clearly states that this type of documentation, while important, is only one piece of information to be considered in the chartering decision.

primary potential members are eligible for inclusion in existing multiple common-bond credit unions. See 12 U.S.C. § (d)(1).

Based on the Act, the NCUA could have adopted a presumption against chartering smaller groups as single common-bond credit unions and that decision would have been entirely consistent with 1759(d)(l)."[15/] The Final Rule, however, contains no such presumption. Instead, the regulation clearly states that [t]he [NCUA]'s view is that the 3,000 primary potential membership threshold is not an absolute requirement, but simply a threshold." 63 Fed. Reg. at 72,001. Thus, there is nothing talismanic about the 3,000 primary potential member limit; as Congress provided, group size is simply one of many factors to be considered by the NCUA, in the exercise of its expertise, in deciding whether it can charter a fiscally sound, successful credit union.

The Final Rule does recognize, however, based on the NCUA's experience, that new, smaller separately chartered credit unions may well not flourish, or even survive, in today's competitive financial services environment.[16/] As the Final Rule states, of

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15/ On the other hand, the NCUA has recognized that [s]tatutorily, there is a presumption that, unless certain exceptions apply, a group larger than 3,000 should form its own credit union." 63 Fed. Reg. at 72,001. Plaintiff does not dispute adoption of this presumption, which is based on the same statutory section that would support a presumption against chartering smaller groups as single common-bond credit unions.

16/ This lawsuit proves that NCUA's conclusions on this point are correct: in pursuit of the financial and competitive interests of banks, plaintiff aggressively seeks to limit the size of multiple common-bond credit unions and force as many

the 29 credit unions chartered since 1996, only one had a primary potential membership base of less than 3,000. 63 Fed. Reg. at 72,001. Furthermore, while some extant credit unions were small when originally separately chartered, "economic conditions and financial service expectations of credit union members were different" then, and the chance that a new small single bond credit unions will succeed is far lower. Id. The NCUA reasonably concluded that:

> [i]t would be remiss simply to say that, since a lower threshold number worked in the past, there is no need to change the economic advisability number today.

Id. In recognition of this unassailable fact of life, the NCUA stated that:

> a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than a proposed credit union with a larger field of membership in order to demonstrate that it is economically advisable and that it will have a reasonable chance to succeed.

Id. It is not irrational to take a "hard look" at a smaller group's ability to survive financially; not to do so would lead to chartering single common-bond credit unions doomed to failure and would be inconsistent with the NCUA1s obligation to safeguard the NCUSIF. See id.

Finally, and contrary to plaintiff's unsupported claim, close examination of the applications of smaller groups in no way flouts Congress's preference for separately chartered credit

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groups as possible into weaker single common-bond credit unions.

unions. As the Final Rule explains, the 3,000 member threshold is both consistent with the Act and Congress's intent and:

> is not intended to undermine the statutory requirement to encourage the formation of new credit unions . . . Any group desiring to form its own credit union will be given every opportunity to demonstrate it has met the economic advisability requirements.

63 Fed. Reg. at 72,001. By the same token, even if groups want to become part of a multiple common-bond credit union, the NCUA will consider whether the groups should be separately chartered.

See id.

Because the Final Rule appropriately and reasonably provides that, the. NCUA carefully examine whether small groups can successfully operate a single common-bond credit union but does not assume that they cannot, it should be upheld.

Third Alleged Defect: Plaintiff's contention that the family members of the primary potential members of a group must be counted towards the 3,000 benchmark number is inconsistent with the plain language of the Act. Specifically, §§ 1759(b)(1) and (2), which define single and multiple common-bond credit unions, require that a group have a "common bond of occupation or association." Only actual employees or association members possess this "common bond;" their spouses, children and relatives do not (unless they, too, belong to the same occupation or association, in which case they would be counted in their own right). The limitation in the Final Rule to counting actual employees or association members (dubbed, as noted earlier, in the Final Rule "primary potential members" of a credit union) is therefore "consistent with the plain language of

the Act. Even assuming that reference to these statutory provisions does not end the Chevron inquiry, the legislative history does. In the House Report to the Act, Congress explained that members in a common occupation or association, and no others:

> Credit union members in the occupational category are employed by the same enterprise, or in the same trade. An associational common bond is available to groups of individuals who participate in activities that develop common loyalties, mutual benefits, and mutual interests.

House Report at 12. The families of primary potential members do not enjoy the communal bonds born of these ties.

Finally, other than § 1759(b), no provision in the Act addresses who should be counted toward the 3,000 threshold. Limiting those counted to primary potential members therefore need only be reasonable, and it is. To begin with, always, the NCUA must consider whether a proposed credit union will be viable. Because actual employees or association members seeking to form or join a credit union are naturally most concerned with that venture's success, counting these interested individuals, and only these individuals, is eminently sensible. Furthermore, focusing on actual employees or association members in making a chartering decision is not a departure from past practice as the NCUA historically has counted such group members when making chartering decisions.

Therefore, the NCUA reasonably determined only to count the core group interested in formation of the credit union.

b. Provisions Governing Voluntary Mergers of Unions With Dissimilar Common Bonds

Plaintiff claims that aspects of the Final Rule that allow voluntary mergers of financially sound credit unions violate the Act because these entities, having demonstrated the ability to function independently, should remain so. See Plaintiffs' Memorandum at 21-23. Again, plaintiff simply is not correct.

To begin with, plaintiff would relegate a multiple common-bond credit union to perpetual spinsterhood: regardless of how fruitful a merger with another credit union might be, it must remain single. But conditions in the ever-evolving financial services sector change and the NCUA has recognized the:

> historic importance of mergers to the financial stability of credit unions . . . Often in today's marketplace, membership diversity and growth are essential ingredients to financially strong credit unions. Merging credit unions is crucial to the entire credit union system and helps reduce the risk to the NCUSIF.

63 Fed. Reg. at 72,003. Perhaps most significantly, however, Congress did not bar mergers in the Act; surely if it were intent on forbidding such mergers it would have said so. Therefore, plaintiff's position finds no support in the Act or its purposes and runs fully counter to the NCUA's mission of providing for fiscally sound federal credit unions and safeguarding the NCUSIF.

The Final Rule, however, does place restrictions on mergers of financially sound multiple common-bond credit unions containing groups with more than 3,000 members.

Although not expressly directed to do so in the Act, the NCUA has required that groups in the multiple common-bond credit union proposing to merge are themselves subject to the 3,000 member numerical limitation of § 1759(d)(1). For

> credit unions seeking to merge containing groups with 3,000 or more members, the provisions of [§ 1759(d)(2)(A)l of the [Act] must be met or the groups in excess of 3,000 will have to be spun off in order for the merger to proceed.

Id. at 72,003. Therefore, credit unions only may merge if the 3,000 plus member groups within the credit unions to be merged satisfy an exception to.the numerical limitation and the surviving credit union satisfies the expansion requirements.

Finally, plaintiff's argument may be that the NCUA must examine groups of less than 3,000 members in each of the merging credit unions to determine whether they, too, must be spun off and separately chartered. Congress did not address treatment of this sized group in the merger context anywhere in the Act. See 63 Fed. Reg. at 72,003 ("Though Congress could have done so, it did not include any language discussing or limiting NCUA’s ability to authorize the merger of existing multiple-common-bond credit unions containing groups with less than 3,000 members.") Therefore, while the numerical limitations of § 1759(d)(2)(A) will apply to voluntary mergers involving multiple common-bond credit unions containing groups with more than 3,000 members,

they will not apply where groups of less than this size are involved.[17/]

This conclusion is supported by the text of the Act. The numerical limitation is applied to groups of more than 3,000 members because mergers (albeit involuntary ones) only are mentioned in the subsection concerning groups of this size. No similar language appears in the subsection establishing that groups of less than 3,000 are eligible to be included in a multiple common-bond credit union. See § 1759(d)(1).[18/]

C. Provisions Governing Expansion of Multiple Common-Bond Credit Unions to Include Groups Located Within a Reasonable Proximity of the Credit Union's Service Facilities

When deciding to approve the expansion of a multiple common-bond credit union to include additional groups, the Act gives the NCUA exceedingly broad discretion to:

17/ Plaintiffs appear to contend that two, identical statements in the legislative history of the Act demonstrate that the numerical limitations were intended to apply to all mergers. See Plaintiff's Memorandum at 22. The quoted language, however, expressly relates only to situations where "groups with over 3,000 members [] join an existing credit union" or "the Board . . . . merge[s] or consolidate[s] a group with over 3,000 members with another credit union for supervisory reasons." 63 Fed. Reg. at 19. See also Senate Report at 7. The legislative history therefore is silent, as is the statute, on the application of the numerical limit where an existing credit union with groups of less than 3,000 chooses to merge with another credit union voluntarily.

18/ The legislative history contains no discussion of this matter. Similarly, § 1759(f), which encourages the formation of separately chartered credit unions, does not apply to mergers.

> require--the inclusion of the group in the field of membership of a credit union that is within a reasonable proximity of the location of the group whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union.

1759(f)(1)(B). Plaintiff claims that the Final Rule impermissibly defines "reasonable proximity" too broadly by interpreting this standard to include the proximity of a group to a credit union's branches and mobile units as well as its principal service office. See Plaintiff's Memorandum at 23-25.

The Court need not conduct any analysis under the first step of Chevron because, as plaintiff concedes, the Act "does not expressly define 'the phrase 'reasonable proximity. Id. at 23. The question, then, is simply whether the NCUA's interpretation of this phrase is reasonable under Chevron step two.

In the Final Rule, the NCUA explained that the Act permits multiple common-bond credit unions to add groups with dissimilar common bonds provided the groups are located "within reasonable proximity of the credit union . . . That is, within the service area of one of the credit union's service facilities." 63 Fed. Reg. at 72,002. The Final Rule rationally concluded, based on the Act and its legislative history, that "reasonable proximity" embodies a geographical limitation. See id [19/] Having established that the credit union must be physically near the group, the next question was how substantial a manifestation of the credit union must be close by. The Final Rule reasonably

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19/ **Plaintiff does not appear to contest this determination.**

concluded that proximity was not limited to geographical closeness to the credit union's main or principal office if the organization had other convenient, multi-service facilities available near the group. See id. Such facilities include a credit union owned branch, a shared branch, a mobile branch that goes to the same location on a weekly basis or a credit union owned electronic facility, but (contrary to plaintiff's claim) does not include an ATM.[20/] See id. [21/]

This listing simply recognizes that the service area of a credit union is defined by the areas that, through its main office or extensions, a credit union can service the group to be added. The purpose of a credit union, of course, is to render such service and its success in so doing likely will determine its viability. The NCUA therefore has provided an entirely reasonable and rational definition of a term that Congress left

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20/ Plaintiff points to a statement in the House Report that supports its position that proximity to an ATM or "similar device" not be considered, but that history involves service by credit unions to underserved areas and has nothing to do with the addition of groups to a multiple common-bond credit union. See Plaintiffs, Memorandum at 24. The Senate Report cited by Plaintiff, as relevant here, has no similar language,and merely repeats a preference for formation of single common-bond credit unions "wherever possible, consistent with safety and soundness-,, See e.g. Senate Report at 7. Finally, the statement by Representative LaFalce cited by plaintiff are his views alone and concern issues facing urban credit unions.

21/ Plaintiff appears to confuse an ATM with a "credit union owned electronic facility." See Plaintiff's Memorandum at 25. The latter, however, is a "service facility," defined as "a place where shares are accepted for members' accounts, loan applications are accepted, and loans are disbursed." 63 Fed.Reg. at 72,002. These are services that an ATM obviously cannot execute.

blank that is consistent with the statute and Congress's desire to ensure -that groups joining a multiple common-bond credit union be adequately served.

d. Provisions Governing Occupational Common Bonds in Single Common-Bond Credit Unions

Plaintiff next contends that the Final Rule should be invalidated because it permits single common-bond credit unions to be comprised of employers that lack "meaningful affinity-" Plaintiff's Memorandum at 25-28. The short answer to plaintiff's claim is that the language of the Act itself says nothing about employers, but rather defines groups in terms of occupation or association. See 1759(b)(1)(a "group [] has a common bond of occupation or association."). Plaintiff has not, and cannot, point to any provision of the Act that restricts combining different employers in a single common-bond credit union provided that the group itself has a common occupational or associational bond. 22/

In any event, not only is the Final Rule not at odds with the Act, it is reasonable and reflects long-standing NCUA policy.23/ Plaintiff specifically attacks two provisions of the

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22/ **Plaintiff offers sixty-year old legislative history in support of its claim that Congress meant to limit single common-bond credit unions to "persons belonging to a single employer group." Plaintiffs, Memorandum at 26. Congress did not, however, adopt any such restriction when it originally enacted the FCUA or the Act.**

23/ **The NCUA notes that this provision is not, a new standard adopted in response to the Act. Therefore, plaintiff has been aware of this standard for years and has not complained that it caused banks irreparable harm. This claim, therefore, provides**

regulation: first, the Final Rule permits employees of companies to coexist in a single common-bond credit union if one entity is related to the other and has a strong dependency relationship on it; and second, the Final Rule allows employees of different companies to be in the same single common-bond credit union if one company owns at least a 10% interest in the other. See Plaintiff's Memorandum at 27. See also 63 Fed. Reg. at 72,007.

As noted earlier, the first challenged provision, or its substantially identical predecessors, merely is a recodification of regulations in effect for years and reflects the agency's long-standing policy that employees in an entity, the entity's subsidiaries and the entity's dependent contractors share a common bond. The NCUA therefore republished its existing rule on common bonds between employees of a company and employees of a contractor dependent on the company:

> [e]mployment in a corporation or other legal entity which is related, to another legal entity (such as a company under contract and possessing a strong dependency relationship with another company) makes that person part of an occupational common bond of employees of the two entities.

63 Fed. Reg. at 71,007.

With respect to the latter provision, plaintiff appears to take issue with the NCUA's decision, by inserting a 10% ownership requirement, to take a more restrictive approach to allowing groups to join in a single common-bond credit union:

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no basis for issuance of preliminary injunctive relief.

> Employment in a corporation or other legal entity with an ownership interest of not less than 10 percent in or by another legal entity makes that person part of an occupational common bond of employees of the two legal entities.

Id. In this regard, the Final Rule noted that certain federal regulations recognize an entity's ownership of 10% of the stock of an company creates a rational presumption that the entity controls the company. Id.

It is beyond peradventure that the NCUA possesses broad discretion to define the contours of an occupational common bond. With respect to both of these bases for finding a common bond, the NCUA noted that this Circuit's First National decision recognized that the agency had broad discretion to define common bond requirements more expansively than it did at that time (and continued to do until publication of the Final Rule). See id.; see also First National Bank and Trust Co. v. National Credit Union Administration, 90 F.3d 525 at 525-26. Given the Circuit's view that "the mere element of resemblance or common characteristic'" was sufficient to find a common bond, the NCUA reasonably determined that these new standards for recognizing a single occupational common bond were well within its discretion.

See id. [24/]

[24/] **Plaintiff spins out rather fanciful scenarios in which, e.g., Microsoft employees share a common bond with the employees of the company's outside law firms and combine in a giant single common-bond credit union. See Plaintiff's 27-28. A less restrictive policy for single common-bond credit unions than that stated in the Final Rule, however, has been in effect for years and this has not occurred. In any event, plaintiff's claim is not ripe for adjudication because no situation of this sort has**

Thus, where the two companies are significantly related and the group shares a common bond of association or occupation, the two companies are properly included in the same single common-bond credit union.

e. Provisions Implementing the "Grandfathered" Aspects of the Act

In its final substantive attack on the Final Rule, plaintiff contends that the NCUA's interpretation of the "grandfather" sections of the Act impermissibly allows members joining groups after the effective date of the Act to become members of a credit union that served the group as of the effective date of the Act. See Plaintiff's-Memorandum at 28-30. The disputed portion of the Final Rule states that the Act:

> permits a member, or subsequent new member, of any group whose members constituted a portion of the membership of any federal credit union at the date of enactment, to continue to be eligible for membership in the credit union.

63 Fed. Reg. at 72,015-15 1

Through the grandfather provision, Congress intended to relieve members of groups and their credit unions from the effect of the First National decision because Congress concluded that this decision was wrong. The Senate Report is clear:

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occurred or is complained of and certainly provides no basis for preliminary injunctive relief. See. e.g., Ohio Forestry Association v. Sierra Club, - U.S., 118 S. Ct. 1665 (1998); Grand Canyon Air Tour Coalition v, Federal Aviation Administration, 154 F.3d 455 (D.C. Cir. 1998).

25/ **Plaintiff incorrectly cites this provision as 63 Fed. Reg. 49,169. See id. at 29. The NCUA points this error out to avoid confusion.**

> any individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and <u>any new member of such group is also eligible.</u>

Senate Report at 7 (emphasis added). Similarly, the House Report states:

> [Title I] provides a broad grandfather for all persons and organizations who could be forced out of credit unions by the Supreme Court's decision in [First Nationa1. This section covers all persons or organizations or successors who were members of a federal credit union on the date of enactment of this Act, as well as anyone who is or becomes a member . . .

House Report at 19 (emphasis added).

As ultimately enacted, the grandfather provision is somewhat m kes no dist n ambiguous because it makes no distinction between members on August 7, 1998, and members joining the group at a later date. See § 17S9(c)(A)(ii). In light of the legislative history, however, Congress plainly meant that both groups be covered; to exclude the class of later-joining members would permit First National to rule from its grave.

Moreover, the Final Rule is a reasonable construction of the grandfather provision. Barring new members who joined the group after the date of the Act's enactment from joining the credit union would resuscitate First National in direct contravention of Congress's abrogation of that decision. Furthermore, a credit union would crippled by such a restriction on adding new members because, as time went on, a smaller and smaller proportion of members of the group could utilize the credit union. This diminished membership would, in turn, force the credit union to

curtail services or, at the very least, prevent it from the increased *services that a robust membership pool would permit. It is unreasonable to agree with plaintiff that Congress intended that First National cast such a long shadow.[26/]

f. The Final Rule Was Issued in Accordance with the APA

Finally, plaintiff complains that the Final Rule (as challenged here) was issued in violation of the APA because it has an effective date of January 1, 1999, which was less than 30 days after publication in the Federal Register. See Plaintiff's Memorandum. at 30-33. Plaintiff's assertion fails for three reasons. First, plaintiff is not aggrieved by the NCUA's decision not to allow for the full 30 days and therefore lacks standing. Second, the Final Rule is a substantive rule that unquestionably relieves the restrictions imposed on multiple common-bond credit unions resulting from First National, and the 30-day requirement is accordingly inapplicable under 5 U.S.C. § S53(d)(1). Finally, the NCUA properly waived the 30-day requirement for good cause, as stated in the Final Rule. See 5 U. S. C. § S 5 3 (d) (3) .

[26/] **In effect, plaintiff seeks to restore the restriction on the addition of new members to existing groups that was imposed by the District Court's injunction in the First National litigation. This position was rejected by this Circuit when it partially stayed the injunction, pending Supreme Court review, thereby permitting credit unions to continue admitting new employees of groups that already were within the credit union's field of membership. It is inconceivable that Congress, in adopting the Act to overrule the Supreme Court's decision, intended to restore such a restriction.**

"It is well established . . . that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." Whitmore v. Arkansas, 495 U.S. 149, 154 (1590). Plaintiff must demonstrate that it has standing to contest the waiver of the NCUA's 30-day waiting period.[27/] The purpose of the 30-day delay provision of 553 (d) (3) is to allow parties subject to s substantive rule sufficient time to prepare to comply with the rule. See, e.g., Omnipoint Corp. v. F.C.C., 78 F.3d 620, 630 (D.C. Cir. 1996)('The purpose of the thirty-day waiting periord is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."); American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).[28/] Plaintiff, which is neither itself a federal credit union nor the representative of a federal credit union, is not a party subject to the new substantive provisions of the Final Rule. Therefore, it need not prepare to comply with the regulations, and suffers no injury by

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[27/] **Whether plaintiff has standing to contest this procedural matter is a distinct inquiry from whether it has standing to attack the substance of the Final Rule, which the NCUA does not dispute.**

[29/] **Plaintiff offers no support for its contention that this provision of the APA was intended to allow parties to "challenge" regulatory action, Plaintiff's Memorandum at 34, and it is quite unlikely that this was Congress's intent. In any event, plaintiff had actual notice of the January 1, 1999 effective date on December 17, 1998, and therefore should not heard to complain about this matter.**

the shortened effective date of the rules. Plaintiff accordingly lacks standing.

Assuming arguendo that plaintiff has standing in this regard,, the NCUA was under no obligation to observe a 30-day (or any) waiting period because the Final Rule relieved restrictions on multiple group chartering and expansion caused by the First National decision. See & 5 U.S.C. § 553(d)(1). This exception is fully applicable here. As this Circuit has noted, under this section, the good cause exception "applies automatically." Independent United States Tanker Owners Committee v. Skinner, 884 F.2d 587, 591 (D.C. Cir 1989), cert. denied, 495 U.S. 904 (1990).[29/] The Final Rule plainly relieved a restriction for purposes of 553(d)(1). First National declared the chartering of multiple common-bond credit unions to be illegal and thus restricted small groups that could not establish their own credit unions from receiving the services of a credit union. Furthermore, First National restricted existing multiple common-bond credit unions, ability to expand and diversify their membership base through addition of employee groups. The Act overturned First National, and the Final Rule eliminates the restrictions imposed by that decision by implementing the Act. Without question, then, the Final Rule relieved restrictions and § 553(d)(1) automatically permits waiver of the 30-day period between publication and effective date.

29/ The fact that the NCUA did not mention this provision in the Final Rule is irrelevant. See id.

In any event, the NCUA properly concluded that good cause justified shortening the 30-day time period. To determine whether good cause exists, an agency:

> should balance the necessity for immediate implementation against principles of fundamental fairness which require all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.

Omnipoint Corp. v. F.C.C., 78.F.3d at 630 (quoting United States v. Gavrilovic, 551 F. 2d 1099, 1105 (8th Cir. 1977)).[30/] As noted above, plaintiff and its members were not required to take any steps in response to the Final Rule. On the other hand, as the NCUA noted above, federal credit unions have been straining under restrictions on their ability to expand throughout most of the First National litigation.[31/] See 63 Fed. Reg. at 72,017. The NCUA found "that credit unions are continuing to be harmed by the inability to add new groups" during the First National litigation. Id. In fact, as plaintiff would not dispute, except under very limited circumstances, credit unions have been unable

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30/ This conclusion is consistent with the legislative history of this provision, which originally was the only exception listed under § 553(d). In discussing the 30-day delay normally provided for by the APA, the House Report states that delayed effective date "will afford persons effected [sic] a reasonable time to prepare for the effective date of the rule." House Report reprinted in APA, Legislative History, 97th Cong. (1944-46) at 259. See also House Proceedings, reprinted in APA, Legislative History, 97th Cong. (1944-46) at 359 "[t1he section requires agencies to proceed with the convenience or necessity of the people affected as the primary consideration . . .").

31/ Plaintiff also recognizes that the NCUA's earlier membership rules were enjoined in that litigation. See Plaintiffs' Memorandum at 33 n.9.

to add groups to their field of membership since the injunction was issued in First National. The injunction prevented credit unions from increasing the size-and diversity of their membership, factors that the NCUA has long recognized are important to the financial health of credit unions. By accelerating the effective date of the Final Rule, credit unions are able to diversify sooner by adding groups, thereby offering more members of the general public the services of credit unions.

Weighing these harms and benefits against competing interests, the NCUA concluded that "any benefit of delaying the effective date (of the Final Rule] is outweighed by the harm to credit unions." Id. This conclusion is manifestly correct credit unions.' where, as plaintiff presumably would not contest, banks and other financial entities' of federal credit unions have enjoyed a competitive benefit over credit unions during this period.[32/] As demonstrated above, plaintiff is highly unlikely to succeed on the merits of its claims and the request for injunctive relief accordingly should be denied.

32/ **Even assuming that the Court disagrees that the NCUA had good cause to waive the 30-day delay period, the appropriate remedy would merely be to stay the effective date until 30 days after publication, or January 29, 1999. See. e.g., Prows v. Department of Justice, 938 F.2d 274, 276 (D.C. Cir. 1991)("We agree with the Tenth Circuit that 1§ 553(d) is susceptible of a reasonable construction that the regulation may be saved and held valid after passage of the 30-day period."). See also McCloth Steel Products Corp. v, Thomas, 838 F.2d 1317 (D.C. Cir. 1988)(noting that courts should consider actual notice of parties of effective date in fashioning remedy and should only delay effective date).**

3. Plaintiff Has Not and Will Not Suffer Irreparable Injury if Injunctive Relief is Denied

"The basis of injunctive relief in the federal courts has always been irreparable harm.'" Sampson v, Murray, 415 U.S. 61, 88 (19'74)(quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506 (1959)). Plaintiff repeatedly claims that, by operation of the challenged regulatory provisions, unidentified banks associated with plaintiff will face unspecified competitive harm and resulting irreparable injury. See e.g., Plaintiff's Memorandum at 13-14, 16, 19t 21, 23, 25 & 28. Plaintiff has utterly failed to satisfy this vital requirement for injunctive relief, however, because it has not identified a single one of its members facing any actual competitive injury. Possible competition -- including the loss of a few potential customers simply is insufficient in this Circuit to support injunctive relief: [t]he mere existence of competition is not irreparable injury, in the absence of substantiation of severe economic impact." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2 841, 843 n.3 (D.C. Cir. 1977).

Similarly, mere subjective fears and speculative predictions of business loss cannot establish irreparable harm. See, e. g. Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 675076 (9th Cir. 1988).[33/]

33/ **Furthermore, any claim by plaintiff that Congress intended to shield banks from competition is incorrect. See First National Bank and Trust Co. v. National Credit Union Administration, 90 F.3d at 529 ("We squarely rejected this argument in the first appeal of this case: 'Congress did not, in**

Plaintiff has offered no substantiation of its claims of irreparable injury. For example, it has not identified a single charter or credit union expansion that has been approved under the new rules that immediately or concretely threatens banks' interests. Moreover, even if applications to charter new credit unions have been approved, those entities obviously are not yet operational and accordingly can pose no present threat to banks, interests.

Finally, actual experience during the first week of operation under the Final Rule belies plaintiff's claims of dire :Competitive harm. Between January 1-8,...1999, the regional, offices of the NCUA received and approved requests from 78 federal credit unions to add groups that, on average, had only 135 primary potential members. , See Declaration of Robert E. Loftus, appended hereto as Exhibit E ("Loftus Dec."), at 4. Moreover, and contrary to plaintiff's unadorned speculation, there has not been a stampede of large groups asking to join existing credit unions: during this period only one credit union asked to add a group of more than 3,000 primary potential members, and that request was denied. See id.[34/]

1934, intend to shield banks from competition with credit unions.")(citation omitted).

[34/] **Plaintiff offers the declaration of its own chief economist, James Chessen ("Chessen"), in support of its claims of harm. Mr. Chessen, however, has a remarkably expansive definition of irreparable harm. For example, he baldly states that banks suffered "irreparable harm" from competition with credit unions even before the Act was passed. See Declaration of James Chessen at 5. Similarly., Mr. Chessen complains that banks "are harmed**

Plainly, no bank has suffered any actual, let alone Irreparable, injury as a result of the new rules, and plaintiff's demand for emergency relief must fail.

4. Plaintiff Has Not Demonstrated that Third Parties Will Not Be Harmed or that the Public Interest Will Be Served Should an Emergency Injunction Issue

In this-case, where the public interest will be harmed by injunctive relief, plaintiff must make a clear showing that the facts and law support the requested injunctive relief. See, e.g., Yakus v. United State, 321 U.S. 414, 440-41 (1944) National Association of Rehabilitation Facilities, Inc. v. Schweiker, 550 F. . Supp. 357, 363 (D.D.C. 1982). Issuance of the requested injunction would prevent the government from approving the lawful expansion of federal credit unions. As the courts repeatedly have noted, injunctions which prevent government officials from discharging their lawful duties inherently harm the responsible government actors. See, e.g., Flower Cab Co. v. Pettite, 685 F.2d 192, 194 (7th Cir. 1982); Lydo Enteriprises v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984). Therefore, preventing the effectuation of the Final Rule constitutes a grave harm to the public interest. See, e.g., New

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whenever an employee-group member looks to a credit union for any particular service." Id. at 18. Indeed, Mr. Chessen makes the incredible statement that [w1henever a customer of an ABA member institution takes his or her business to a credit union, the ABA member institution is irreparably harmed." Id., 16. Furthermore, Mr. Chessen devotes much of his attention to the alleged competitive advantages that credit unions enjoy because of their tax treatment; this is not at issue in this action. See id., 5, 12-13.

Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977)(Rehnquist, J., concurring)("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

Finally, federal credit unions are not mandated by the government, and membership in them is entirely voluntary. By seeking to hobble the ability of workers to form or Join strong, vigorous credit unions, plaintiff is attempting to deprive these individuals of their right to participate in credit unions that will survive financially and be capable of providing a full range of services. It should be remembered that these worker always are free to patronize banks rather than their credit union. Plaintiff in effect asks the Court to leave these individuals with only the option of utilizing banks, services. As noted in the attached declaration, the NCUA has received requests by 178 groups to join credit unions. See Loftus Dec., 4. These requests speak volumes about the demand of workers for federal credit unions. If the NCUA is enjoined from approving charter applications or expansions under the Final Rule, these third parties' interests clearly will be injured.[35/]

35/ **It is the understanding of the NCUA that the putative intervenors, if permitted to join in this litigation, will provide additional specific examples of harm to third parties.**

CONCLUSION

In sum, plaintiff has failed to satisfy any of the four prerequisites for issuance of a preliminary injunction, and its motion should therefore be denied.

Dated: Jan. 15, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and complete copy of Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction (with exhibits) was served by placing said copy in the United States mails, first class postage prepaid, addressed to:

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Dated: Jan.,15, 1999 _____

Conformed Copy: Contains Changes Per "Notice Of Corrections" Filed On January 21, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Bankers Association,

Plaintiff,

V. **Civil Action No. 99-00042 (CKK)**

National Credit Union Administration,

Defendant.

PLAINTIFF AMERICAN BANKERS ASSOCIATION'S REPLY MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR A PRELIMINARY INJUNCTION

Plaintiff American Bankers Association ("ABA") respectfully submits this reply memorandum in support of its application for a preliminary injunction.

A. The Credit Union Membership Access Act ("CUMAA")

The National Credit Union Administration ("NCUA") says that "[i]n August 1998, Congress abrogated [the Supreme Court's decision in] First National by amending the FCUA to incorporate ... NCUA's policies" regarding the chartering of multiple common bond credit unions. (NCUA Opp. at 1.) That is what the NCUA and the credit union lobby wanted, but that is not what happened. NCUA's illegal policy, for example, contained no limits on the size of a group that could join a multiple common bond credit union. Congressman LaTourette did introduce a one-paragraph bill that would have reinstituted that policy.1/ But the final

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1/ **A copy of Congressman LaTourette's bill (H.R. 115 1) is attached hereto as Exhibit A for ease of reference.**

legislation was dramatically different. It was, as Credit Union National Association ("CUNA") forthrightly admits here, a compromise, just like other legislation Congress passes when competing industry groups have strongly different views.[2/]

Rather than allowing unlimited multiple group credit union expansion, as did the NCUA's illegal pre-First National policy, the CUMAA limits the formation and growth of multiple common bond credit unions. It does that in part by directing the NCUA to "encourage the formation of separately chartered credit unions ... whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1). The NCUA tells this Court that this provision of law is a broad "authoriz[ation] [to] the NCUA to approve expansion of multiple common-bond credit unions," (NCUA Opp. at 8), but the plain language of the statute, as well as its structure and legislative history, show otherwise.[3/]

The CUMAA also specifically provides that only, groups having fewer than 3,000 members shall be eligible for inclusion in multiple common bond credit unions, unless one of three specific exceptions is satisfied. 12 U.S.C. § 1759(d)(1) ("[e]xcept as provided in paragraph (2), Q& a group with fewer than 3,000 members shall be eligible to be included in" a multiple common bond credit union) (emphasis added). Contrary to the NCUA's assertion here, (see. e.g.,

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[2/] **(See CUNA Answer 12 (admitting that "CUMAA was not compromise legislation in a manner that differentiates it from other legislation passed by Congress") (emphasis added)).**

[3/] **E.g, S. Rep. No. 105-193, at 7 (1998) ("This section provides for the NCUA to encourage the formation of separately chartered credit union wherever possible, consistent with safety and soundness, instead o including an additional group within an existing credit union's field of membership") (emphasis added).**

NCUA Opp. at 26, n. 15), neither this provision, nor any other for that matter, provides that groups having fewer than 3,000 members are to be automatically allowed to join a multiple common bond credit union, and both section 1759 and the CUMAA's legislative history affirmatively refute such a reading of the statute. See H.R. Rep. No. 105-472, at 20 (1998).

The CUMAA also makes clear that exceptions to the 3,000 member limit are to be narrowly construed and sparingly applied. Letter of Congressman John J. LaFalce, Nov. 12, 1998, at 2 ("[W]e sought to limit or restrict this expansion [of multiple common bond credit unions] in ways that would reinforce traditional credit union principles and address competitive concerns of other financial institutions") (attached as Exhibit B to the Declaration of Jonathan Mastrangelo) ("Mastrangelo Decl."); H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7.

B. The ABA Will Likely Succeed On the Merits

When the CUMAA is read in light of the actual Chevron standard -- that is, when the language, structure and purpose of the Act are examined to ascertain the intent of Congress -- it is clear that the parts of the rule we challenge are invalid. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (court uses "traditional tools of statutory construction" when determining if intent is clear under "step one"); National Credit Union Admin. v, First Nat'l Bank & Trust, 118 S. Ct. 927, 939-40 (1998) (applying "tools of statutory construction" to determine that intent of Congress is clear and rule is invalid).[4/]

[4/] **ABA's claims are ripe because they are fit for decision and because postponing review will cause hardship. See,. e.g., Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 471 (D.C. Cir. 1998). The issues we have presented -- ranging from whether the NCUA may establish a presumption against groups under 3,000 forming their own credit union, to whether it has correctly construed the grandfather provisions of the CUMAA, to whether family and**

(continued...)

1. Multiple Bond Credit Unions,

a. Expansion of Multiple Credit Unions By Adding Groups Over the 3000 Limit, The CUMAA provides that multiple common bond credit unions can add a group over 3,000 only if the group could not operate a separate credit union itself because it (1) lacks sufficient resources to operate a credit union, (2) possesses demographic or other characteristics "that may affect the financial viability and stability of a credit union," or (3) is found to be "unlikely to operate a safe and sound credit union." 12 U.S.C § 1759(d)(2). Congress said it "d[id] not intend for these exceptions to provide broad discretion to the [NCUA] to permit larger groups to be incorporated within or merged with other credit unions." H.R. Rep. No. 105-472 at 19; S. Rep. No. 105-193 at 7. But the NCUA tells this Court that the statute lets it give "whatever weight it sees fit," (NCUA Opp. at 25), to whether the group wants to operate a separate credit union, rather than (as we contend the statute requires) granting an exception to the 3,000 member limit only when the group is incapable of operating a separately chartered credit union.[5/]

[4/] (... continued)
household members must count toward the 3,000 member limit established by the statute (and the rest) -- are significant legal issues, now quite fully briefed, that do not require further factual development for purposes of determining whether ABA has a likelihood of success on the merits. And, for reasons described below in connection with the irreparable injury point, ABA's members will indeed suffer a hardship if a judicial determination of the legality of the NCUA's actions is postponed.

[5/] **Both the NCUA and National Association of Federal Credit Unions ("NAFCU") contend that the plain language of CUMAA supports the agency's position, relying alternatively on the "virtually unrestricted language" of section 1759(d)(2)(A)(ii), (NCUA Opp. at 25), and the reference to "volunteer ... resources" found in subparagraph (d)(2)(A)(i). They are wrong. The plain language of the Act in fact refutes the NCUA's position because paragraph (d)(2)(A), which**

(continued...)

The NCUA contends that the ABA's literal reading of the statute must be in error because "[u]nder the plaintiffs view ... the NCUA would be compelled to charter an unwilling group separately, irrespective of the group's commitment to operating a credit union on its own." (NCUA Opp. 24-25.) That is profoundly wrong. If the agency determines the large group could operate its own credit union, it should simply deny the application to add it to a multiple common bond credit union. Nothing "compels" the agency to grant a charter for which a group has not even applied.

The NCUA's treatment of the CUMAA's limitation on multiple common bond credit unions is distressingly reminiscent of its earlier treatment of the limitation found in the old Federal Credit Union Act ("FCUA"). By allowing groups with over 3,000 members to qualify themselves for membership in a multiple common bond credit union, with the simple assertion that they would rather not have a separate charter, the new rule, like the one struck down in First National, "has the potential to read [the statutory membership limitation] out of the statute entirely." First Nat'l Bank , 118 S. Ct. at 940.

5/ (... continued)

modifies the language relied on by both the NCUA and NAFCU, expressly limits the factors that justify exceptions to the 3,000 member limit to those that demonstrate that the common bond group "could not feasibly and reasonably establish a new single common bond credit union .... a (emphasis added). The word "feasibly" means "capable of being accomplished ... or possibly," The American Heritage College Dictionary at 499 (3d. ed. 1993), and, by including that word, the statute limits the granting of exceptions to cases where the common bond group is incapable of operating a separate credit union, rather than ones where it simply does not want to.

b. The NCUA's Presumption Against Separate Charters for Groups Under 3.000, The NCUA contends that its presumption that groups having fewer than 3,000 primary potential members cannot form economically viable, separately chartered credit unions should be upheld under "step two" of Chevron because (1) the text of the CUMMA "makes no express mention of 'presumptions' about separately chartering new groups," (NCUA Opp. at 25) and (2) the final rule asserts that the presumption is "'not intended to undermine the statutory requirement to encourage the formation of new credit unions.'" (Id at 28) (citation omitted).[6/] The NCUA is wrong on both counts. Congress' intent, as reflected clearly in the language, structure and legislative history of the CUMAA, was that the agency not assume that groups below the 3,000 member limit cannot form separately chartered entities; and the existence of such a presumption, notwithstanding the rule's obfuscatory language, does have the effect of undermining the statutory mandate that the agency encourage the formation of separately chartered credit unions.

Any fair reading of the language, purpose and history of the CUMAA makes clear, we submit, that the NCUA was not to assume that groups having fewer than 3,000

6/ The NCUA's brief engages in a semantical game. On the one hand, it contends that IRPS 99-1 "contains no ... presumption" against the chartering of separate credit unions having fewer than 3,000 members, (NCUA Opp. at 26); however, the NCUA's brief acknowledges (as it must) that the agency will take a "hard look" at groups having fewer than 3,000 potential primary members because it assumes that such groups are less likely to be "economically viable." (Id at 27). This is a distinction without a difference because the statutory test for chartering a group separately is economic viability – i.e., whether it would be "practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). If the agency creates a presumption that certain credit unions are not economically viable, then it is creating a presumption that they cannot be separately chartered.

members cannot form their own separately chartered credit unions. The statute directs the NCUA to charter separate credit unions whenever possible. The House Report states unequivocally: "[T]he 3,000 member figure is not intended to indicate that groups below the 3,000 member limit are incapable of forming new, viable credit unions." H.R. Rep. No. 105-472, at 20. Yet, the NCUA's rule makes precisely the assumption Congress rejected. The inconsistent "findings" made by the NCUA in its final rule -- which simultaneously purport to justify the need for the presumption on the basis of prior experience, See 63 Fed. Reg. at 72,000 ("based on historical data and evidence of economic viability ... a credit union with fewer than 3,000 primary potential members ... may not be economically advisable"), even while noting that a substantially lower "economic viability" figure had in fact "worked the past," id at 72,001 -- are irrelevant. Congress considered and stated its conclusions on this issue. That is the "end of the matter." Chevron, 467 U.S. at 842-43.

The NCUA does not, and cannot, explain how its special burden on groups under 3,000 can be given effect without both discouraging the formation of separately chartered credit unions and encouraging such groups to join in a multiple common bond credit union -- in effect, the old, illegal NCUA policy.[7/] This NCUA rule cannot be squared with the statute. See 12 U.S.C. § 1759 (the NCUA is to encourage the formation of separately chartered credit unions); H.R. Rep. No. 105-472, at 19 ("The Committee does not intend for this numerical limitation to

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7/ **This result occurred instantly. As reflected in an exhibit attached to the brief submitted by NAFCU, under its new rule the NCUA has not rejected a single application**

submitted by a common bond group with fewer than 3,000 primary potential members seeking membership in an already existing credit union. (NAFCU Opp. at Ex. 5.)

be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union.").

c. Exclusion of Family and Household Members for Purposes of the 3,000 Limit, The NCUA acknowledges that the CUMAA requires that it consider all persons sharing the common bond when calculating group size for purposes of the 3,000 member limit but contends that the plain language of the CUMAA directs it to count only "primary potential members" because "their spouses, children and relatives" do not share the common bond. (NCUA Opp. at 28.) In fact, the CUMAA does even not contain the phrase "primary member," and immediate family and household members are eligible for membership in a common bond credit union precisely because they do share the common bond.

The law applicable to credit union membership in both single and multiple common bond credit unions is straightforward and clear: To be eligible for membership in a credit union, a person must be part of the common bond group. 12 U.S.C. § 1759(b)(1) (a single common bond credit union has "[o]ne group that has a common bond of occupation or association"); 12 U.S.C. § 1759(b)(2) (a multiple common bond credit union has "more than one group. . . each of which has (within the group) a common bond of occupation or association"). Persons who do not share the common bond are not part of the group, and are therefore not eligible as group members to join the credit union.

The statute provides just two "exceptions" to its general membership requirements in section 1759(c). One is for persons whose membership is "grandfathered," 12 U.S.C. § 1759(c)(1); the other is for "person[s] or organization [s] " in "underserved areas." Id.

§ 1759(c)(2). Everyone else joining a credit union must share that credit union's single (or one of its multiple) common bonds.

The CUMAA does not have or need an exception for immediate family and household members because the NCUA has long taken the position that family members do share the group's common bond.[8/] The NCUA's prior membership rule had expressly provided that immediate members were part of the common bond of occupation or association, identifying them as persons "sharing [the] common bond." 59 Fed. Reg. at 29,079 (emphasis added). And, as we noted in our opening brief, IRPS 99-1 specifically retains that policy by providing that immediate family and household members are eligible for credit union membership because they are "persons sharing [the] common bond." 63 Fed. Reg. at 72,037 (emphasis added). In a telling omission, neither the NCUA's brief, nor the briefs submitted by the credit union intervenors, respond to this point.

d. **The Voluntary Merger Rule**, The new NCUA rule will permit voluntary mergers of healthy multiple common bond credit unions containing groups of fewer than 3,000 members without a determination as to whether any or all of those groups could feasibly create a separate credit union.[9/] We contend that this rule violates the statutory directive that NCUA

[8/] **The passage of the House Report relied on by the NCUA is not to the contrary. (NCUA Opp. at 29.) That passage only states the obvious -- that common bond groups are formed around bonds of association and occupation. It does not address the question of whether persons related to "primary members" are also considered part of the occupational or associational group. Both the statute and the NCUA's current and prior membership rules make clear, however, that these persons must be members of the common bond.**

9/ See 63 Fed. Reg. at 72,003 (allowing mergers of healthy credit unions

(continued ...)

that encourage the formation of separately chartered credit unions whenever possible. 12 U.S.C. § 1759(d). The NCUA's response is basically that the statute never expressly says that it has to do this when considering mergers. (NCUA Opp. at 30.)

One fundamental flaw in the NCUA's argument is that it is a creature of statute, and it needs to demonstrate that it has authority to take any action it takes. The NCUA does not point to any statutory language that grants it express authority to authorize voluntary mergers of financially sound credit unions, and indeed there is none.10/ If mergers are to be permitted at all, it must be on the theory that they are just another way for a multiple common bond credit union to expand its field of membership. But, under the CUMAA, a multiple common bond credit union can lawfully expand its field of membership only subject to a carefully crafted set of limitations imposed by Congress, including a determination by the NCUA that the group proposed to be added cannot operate its own credit union. The NCUA rule says it will not make that determination in connection with voluntary mergers involving groups under 3,000, even though it recognizes that it has to make such a determination of multiple common bond credit unions. That rule violates the statute.

9/ (....continued)

" contain[] select employee groups of less than 3,000 potential primary members"). The NCUA has represented to this Court that it will comply with the statutory requirements in assessing voluntary mergers of credit unions whose field of membership includes groups of over 3,000 members. (NCUA Opp. at 31.)

10/ The only statutory provision that expressly grants the NCUA the authority to approve mergers of credit unions having dissimilar common bonds applies by its terms

only where one of the merger parties "is insolvent or is in danger of insolvency," 12 U.S.C. § 1785(h) -- so-called emergency mergers, which are not at issue here.

e. **The Reasonable Proximity-Rule**, The NCUA's membership rule violates the CUMAA, even though "reasonable proximity" is not expressly defined in the statute, because Congress made clear that the NCUA's definition of "service facility" was to remain the same, and contrary to that intent, the rule dramatically expands the definition of "service facility."

Both the House and Senate Reports make clear that Congress did not intend for the NCUA to alter its definition of service facility. H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193 at [11/] The NCUA tries to dismiss this legislative history as irrelevant because it appears in a section of the House and Senate Reports concerning "service by credit unions to underserved areas. - - ." (NCUA Opp. at 34, n.20.) But in its preamble to IRPS 99-1, the NCUA relied on these very passages from the House and Senate Reports in recognizing that: "The legislative history of the CUNLAA is clear that the NCUA should not treat ATMs as service facilities for select group expansions." 63 Fed. Reg. at 72,002.

The plain fact is that Congress intended for the NCUA to retain its then-existing definition of "service facility" -- the agency's longstanding benchmark for the geographic location of a credit union. S. Rep. No. 105- 193, at 7 ("[t]he term
'facility' is meant as it is defined by the NCUA") (emphasis added). Under that definition, a "service facility" is a place

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[11/] **The NCUA's brief states incorrectly that "[t]he Senate Report cited by Plaintiff, as relevant here, has no similar language ... [to the House Report's]." (NCUA**

Opp. at 34 n.20.) In fact, the Senate Report provides: "The term 'facility' is meant as it is defined by the NCUA. An automatic teller or similar device does not qualify as a service facility." S. Rep. No. 105-193, at 7.

"where ... a member can deal directly with a credit union representative. . . ." 59 Fed. Reg. at 29,078. The NCUA, however, broadened that definition substantially, requiring that the new group be only reasonably proximate to an electronic service center, without any requirement that a member be able to "deal directly with a credit union representatives" there.

2. Single Common Bond Credit Unions

The NCUA Rule provides that employees of two companies automatically and always share a "single common bond" by reason solely of the fact that one of the companies has a 10 percent ownership stake in the other. This is a violation of the requirement that all members of a single common bond occupational credit union share a single common bond -- a requirement of the original 1934 Act that Congress did not change in the CUMAA.[12/]

The NCUA defends the 10 percent rule by analogy to the Federal Reserve's regulations interpreting the Change in Bank Control Act ("CIBC Act"). (NCUA Opp. at 36-37); 63 Fed. Reg. at 72,007. But this is a plain misuse of the CIBC regulations. Those regulations only create a rebuttable presumption of control when a person owns 10 percent of the voting stock of a. bank and only then when other specific conditions are met, including that no other

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12/ **The NCUA quotes from the decisions of the Supreme Court and this Circuit in First National Bank that employees of subsidiaries share a common bond with the employees of the parent enterprise. (NCUA Opp. at 16 n.10.) However, there is nothing in the Supreme Court's opinion to suggest that the Court was giving the term subsidiary other than its common meaning, which is a corporation "in which another corporation (i.e., parent corporation) owns at least a majority of the shares." Black's Law Dictionary 1428 (6th ed. 1990). Moreover, the D.C. Circuit was clearly discussing wholly owned subsidiaries. First Nat'l Bank 90 F.3d at 528 ("suppose that Company A buys Company B ... [j]oint ownership of Companies A and B create a common bond" (emphasis added)). In fact, the D.C. Circuit expressly cautioned the NCUA from reading the phrase "common**

bond" in a manner that would "drain the phrase... of all meaning," id., which is precisely what the agency has done in adopting the 10 percent ownership rule.

shareholder owns a greater percentage of that voting stock. 12 C.F.R. § 225.41. By contrast, IRPS 99-1 states that, by operation of law, when Company A owns 10 percent of Company B the employees of both companies always and necessarily share a common bond of occupation -- regardless of any other facts, including whether some other entity owns the other 90 percent of Company B, or the two companies are competitive in the marketplace or even locked in a takeover battle That rule is inconsistent with the "single common bond" requirement of the Act -- and wholly unjustified by the CIBC regulations that NCUA cites to defend itself.[13/]

3. The "Grandfather" Provision

There is no serious dispute that, as a matter of simple English, the grandfathering provision, on its face, applies only to persons who were members of unlawfully added common bond groups on the date of the enactment of CUMAA. That is in fact what the statute says:

> A member of any group whose members constituted a portion of the membership of any Federal credit union as of the date of enactment shall continue to be eligible to become a member of that credit

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[13/] **The NCUA argues that the 10 percent ownership limitation is a more restrictive approach than its prior policy. (NCUA Opp. at 36.) This is disingenuous (at best). In rules adopted in 1989, the NCUA stated that occupational common bond means "employment by the same enterprise" and includes employment in a "parent corporation and its wholly owned subsidiaries." 54 Fed. Reg. 31,165, 31,169 (1989)(emphasis supplied). In 1994, when the NCUA revised the rules it promulgated in 1989, it included "employment in a corporation or other legal entity with an ownership interest in or by another legal entity" in the definition of occupational common bond. 59 Fed. Reg. 29,066, 29,075 (1994). But the NCUA said that this change in language was made only "to provide more clarity," and it expressly disavowed substantively broadening the term occupational common bond. Id. at 29,069 ("the Board does not see the need to broaden the definition of**

occupational common bond at this time"). The 10 percent rule is thus, in fact, far less restrictive than the NCUA's prior approach.

> union, by virtue of membership in that group, after the date of enactment.

12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added). A "member of a group" can "continue" to be eligible after the date of enactment only if he or she was a member of the group on the date of enactment.

The NCUA says that the grandfather is not limited to members of the group at the date of enactment of CUMAA because of the following sentence in the Senate Report:

> [A]ny individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and any new member of such group is also eligible.

S. Rep. No. 105-193, at 7 (emphasis added).[14/]

But this sentence exactly makes our point. The first part of the sentence (not underlined) is virtually identical to the statutory language; the second part of the sentence (underlined for clarity above) is the part of the sentence that the NCUA relies on for its position. But the second part of the sentence is not in the statute.

The NCUA's proposed construction of the grandfather provision, in addition to being unwarranted by the language, would transform the statute from a transitionary grandfathering provision -- allowing credit unions to gradually come into compliance with the law over time -- into an indefinite extension of the NCUA's unlawful chartering policy. We submit that if Congress had meant for the grandfathering provision to have this expansive

14/ **The NCUA and NAFCU also cite a similar statement from the House Report. (NCUA Opp. at 3 9; CUNA Opp. at 10.)**

meaning, it would have expressly provided additional language, like that in the Senate Report, in the text of the statute. But it did not.

The NCUA says that reading the statute as it is written will lead to absurd results, suggesting even that multiple con-unon bond credit unions will "crippled," (NCUA Opp. at 39); CUNA says they will "wither and die." (CUNA Opp. at 10.) This is just not so. If the statute is read to mean what it says, the provision will do what "grandfathering" clauses usually do -- allow for an orderly transition period that leads to conformance with law. The affected credit unions will simply have to comply with the CUMAA in order to add members who joined the common bond group after the CUMAA was passed.

In other words, the statute sensibly works this way: persons who, as of August 7, 1998, were members of a common bond group that was illegally part of a multiple common bond credit union under First National can join without regard to the new requirements in the CUMAA. If the credit union (say, AT&T Federal) wants to add persons who later join the group (say, persons who become employed by Pepsi after August 7, 1998), the credit union simply needs to apply to the NCUA to expand its field of membership under the CUMAA. If the group meets the CUMAA requirements, the field of membership will be expanded. If -- as is plainly the case -- the NCUA and its allies fear that many such groups will not meet CUMAA's requirements, their predictions of disaster simply confirm their intense desire to avoid having CUMAA's restrictions apply to them forever. That is precisely what Congress did not intend.15/

15/ **There is nothing draconian about that result, which does nothing more than give the statue its intended "grandfathering" effect, and it comports with this Circuit's general interpretation of grandfathering clauses. See National Assoc. of Cas. & Surety Agents v. Federal**

(continued . . .)

C. The ABA Will Suffer Irreparable Injury if a Preliminary Injunction is Not Issued,

The NCUA's contention that ABA members are not irreparably injured by the unlawful, expansion of the credit unions with which they compete is wholly undermined by Judge Jackson's contrary holding in First Nat'l Bank & Trust Co. v, NCUA, Nos. 90-2943, 96-2312 (D.D.C. Oct. 25, 1996) (attached as Exhibit C to CUNA Opp.). Faced with exactly the same arguments by exactly the same parties, Judge Jackson held that the ABA's members "sustain irreparable injury with each new addition to the membership rolls of competing financial institutions. because the amount of financial business they will lose in consequence is impossible to ascertain for purposes of an award of damages. "Id. at slip op. 5-6 (emphasis added). That conclusion is right and dispositive. Indeed, Judge Jackson's decision should collaterally estop the NCUA and its allies from relitigating the issue here.16/

Even if the NCUA were not precluded on the irreparable injury issue, our opening memorandum and the accompanying Declaration of James Chessen make clear that IRPS 99-1

15/ (... continued)
Reserve, 856 F.2d 282, 286 (D.C. Cir 1988) ("the Board recognized that grandfather provisions must be construed narrowly, as exceptions to general rules").

16/l **All the requirements for collateral estoppel are fully satisfied here. See Securities Indus, Assn v. Board of Governors, 900 F.2d 360, 363 (D.C. Cir. 1990). First, the question whether the ABA and its member institutions are irreparably harmed by the NCUA's expansive interpretation of credit union membership eligibility rules was "actually litigated" before Judge Jackson. Second, whether the ABA and its members were**

irreparably harmed was an issue "necessary to [Judge Jackson's] judgment" granting both preliminary and permanent injunctive relief in that case. Third, the parties to the two proceedings are identical; the NCUA had ample opportunity to contest the issue in the earlier and had no reason not to mount a vigorous defense of its position.

causes irreparable harm to plaintiffs. It is obvious, as a matter of common sense, that as credit unions get larger, they take customers away from the tax-paying institutions that compete with them. (See Chessen Decl. 13, 16-17.) This harm is irreparable because, as Mr. Chessen explained, revenue lost to unfair competition can never be completely recovered. (See, Chessen Decl. 16.) As Judge Jackson held in First National, Nos. 90-2943, 96-2312, slip op. at 5-6, "[T]he amount of financial business [ABA members] will lose ... is impossible to ascertain for purposes of an award of damage, if indeed anyone were liable." That is the essence of an irreparable injury.[17/]

Moreover, the harm ABA member institutions claim here is hardly speculative, future injury. IRPS 99-1 has been in effect since January 1, 1999. Since that time, the NCUA has been approving expansions to multiple common bond credit unions at a rapid rate. According to the information attached to the memorandum of Defendant-Intervenor NAFCU, as of January 8, 1999, the NCUA had approved 24,116 potential new credit union members under the rule, a rate of more than 6,000 every business day,[18/] The NCUA's past conduct also suggests

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[17/] **It is irrelevant that, as the NCUA claims, Congress may not have "intended to shield banks from competition." (NCUA Opp. at 45 n.33.) As the Supreme Court held only last year, "[E]ven if it cannot be said that Congress had the specific purpose of benefiting commercial banks, one of the interests arguably to be protected by [the FCUA] is an interest in limiting the markets that federal credit unions can serve." First Nat'l, 118 S. Ct. at 935.**

18/ **Despite numerous requests, the NCUA has refused to provide the ABA voluntarily with any information relating to those approvals. We were advised by counsel for NAFCU, however, that the NCUA voluntarily provided it with related information, (NAFCU Opp., Ex. 5), upon their request. It is outrageous for the agency to cooperate with one party while refusing to assist another in this way. We ask that, as a matter of fundamental fairness, the Court not permit the NCUA to rely on information that it has withheld from us. (See e.g., Declaration of Robert E. Loftus (Attached as Exhibit E to NCUA Opp.).)**

that it will move aggressively to implement its new membership rules without regard to this pending litigation and the difficulty of dismantling field of membership expansions once they are approved.19/

In light of the significant, imminent, and non-compensable injury IRPS 99-1 causes to ABA member institutions, there is ample basis to conclude, as Judge Jackson did in comparable circumstances, that the ABA will suffer irreparable harm if IRPS 99-1 is not enjoined pending this Court's decision on the merits.

D. The Public Interest Is Advanced, and Third-Parties Are Not Harmed, Issuance of Injunctive Relief

Contrary to the NCUA's claims, (NCUA Opp. at 47-48), the interests of third-parties seeking to join credit unions, as well as the interests of the public, will be served, not harmed, by the issuance of injunctive relief pending final resolution of this case. If we are right, customers who join credit unions under the challenged provisions of IRPS 99-1 do so without legal authority. It contravenes the public interest for federal credit union membership to be increased in violation of the statutory limitations set forth by Congress. Moreover, given the NCUA's aggressive approval of new credit union members, if the agency is permitted to proceed, thousands of individuals may be led to sever their existing financial relationships with non-credit

19/ In previous cases, the NCUA implemented its rules in defiance of court decisions and without regard to pending legal challenges. &e. e,g., First Nat'l Bank, Nos. 90-2943, 96-2312, slip op. at 7 ("The ABA case was filed by plaintiffs only when they were alerted in August to NCUA's unwillingness to accept the D.C. Circuit decision. . . , and its startling assertion upon return of the mandate that it would not voluntarily obey it). Given this track record, it is simply unreasonable to expect ABA members to rely on the good will and prudence of the NCUA in implementing a rule while under court review.

union institutions only to find that the solicitous credit unions cannot lawfully serve them. Such needless disruption of the financial affairs of thousands of individuals cannot serve the interests of these third-parties or the public.

E. The NCUA Promulgated IRTS 99-1 in Violation of the APA,

The NCUA cannot justify its attempt to make its membership rule effective just two days after the rule's publication in the Federal Register -- well short of the 30-day notice period required by the APA. See 5 U.S.C. § 553(d).

First, contrary to the NCUA's contentions, the ABA has standing to challenge the NCUA's failure to comply with this provision. The NCUA itself says that "[t]he purpose of this waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect." (NCUA Opp. at 41 (quoting Omnipoint Corp. v. FCC, 78 F.3d 620, 630 (D.C. Cir. 1996))) (emphasis added). The Supreme Court has held in unmistakable terms that the ABA and its member institutions are parties "affected" by NCUA rules governing credit union

membership.[20/] The ABA thus has standing to challenge the NCUA's failure to comply with the APA's procedural requirements. Second, the NCUA cannot take advantage of the exception to section 553(d) for rules that "relieve a restriction" because no "restriction" existed within the meaning of the APA.

Second, the NCUA cannot take advantage of the exception to section 553(d) for rules that “relive a restriction” because no “restriction” existed within the meaning of the APA. See 5 U.S.C. & 553(d)(1). While the NCUA and its allies view the Supreme Court's decision in First National as having imposed a "restriction" on credit union membership that the NCUA is now lifting, the fact is that the limitations on membership were in the FCUA since 1934 and what the Supreme Court did was to declare that the NCUA was violating that Act. Congress changed the Act in a variety of ways thereafter, and IRPS 99-1 implements (or is supposed to implement) a new set of statutory authorities and restrictions imposed by Congress in the CUMAA. For this reason, the current situation is a far cry from that which existed in Independent U.S. Tanker Owners Comm, v. Skinne, 884 F.2d 587, 591 (D.C. Cir. 1989), the only case the NCUA relies on in making an argument to the contrary. (NCUA Opp. at 42.) In Skinner, the Maritime Administration was attempting to relieve a single restriction from a fifty year old statutory scheme (in a manner that the Supreme Court determined was within the

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20/ **In First National, 118 S. Ct. 927 (1998), the Court held that "as competitors of federal credit unions, [banks and banking associations] certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation [of its membership rules] ... affect[s] that interest by allowing federal credit unions to increase their customer base. Id. at 936 (emphasis added). The NCUA offers no support for its contention that only regulated entities are "affected parties" for purposes of the 30-day waiting period. (NCUA Opp. at 41.) Courts interpreting section 553(d) have recognized that there is a broad range of (activity that the waiting period is meant to encourage. See.e.g., Union Oil Co, v, United States Dep't of Energy, 688 F.2d 797, 812 Temp. Emerg.**
(continued 20/)
Ct. **(App. 1982) (purpose of § 553(d) is to "afford persons affected a reasonable time to prepare for the effective date of the rule or rules or to take other action which the issuance may prompt" (quoting S. Rep. No. 752. 79th Cong., 1st Sess. 15 (1946)) (emphasis added)).**

agency's authority). The agency was not implementing a brand new set of statutory guidelines and restrictions, as the NCUA is here.

Finally, the NCUA cannot excuse its failure to comply with the APA's waiting-period provision by claiming the benefit of the "good cause" exception.21/ IRPS 99-1 is the product of ordinary -- not emergency -- rulemaking, and the "harm" the NCUA cites is merely the delay (the vast bulk of it due to the time the NCUA took for the rulemaking process) routinely associated with the process of adopting regulations to implement new statutory provisions. ABA agrees that the appropriate remedy for violations of section 553(d) is to stay IRPS 99- I's effective date until January 29, 1999 -- 30-days after the rule's publication -- but of course, in addition, all credit union approvals made while the rule was unlawfully in effect must be invalidated. Such a return to the status quo ante is the only way to remedy the effects of the premature implementation of the rule.22/

21/ **As NAFCU admits, the rule the NCUA approved on December 17, 1998, did not contain any finding of good cause. (NAFCU Opp. at 2 1.) It was only after counsel for plaintiffs made this fact known to the NCUA that the agency held a vote on the good cause issue, apparently without a meeting, on December 22, 1998. Despite the belated addition of**

good cause language, the Federal Register does not tell the public that the good cause determination was made well after the rule was adopted.

22/ **The NCUA errs in contending that the ABA is somehow precluded from objecting to the agency's failure to comply with section 553(d) because it had "actual notice" of the rule. First, there is no exception to the APA's waiting period where there is actual notice. See 5 U.S.C. § 553(d). But, more importantly, in light of the material differences between the version of the rule the NCUA published on its website and the rule it actually promulgated, see note 21, supra it is hardly reasonable for the NCUA to claim that knowledge the ABA gleaned from the agency's website is sufficient notice for purposes of section 553(d).**

CONCLUSION

For these reasons, and those provided in its opening memorandum of law, ABA has met the standard for the issuance of a preliminary injunction.[23/] Accordingly, ABA respectfully requests that the Court enter a preliminary injunction preventing the NCUA from implementing IRPS 99-1.

Respectfully submitted,

_____
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23/ As this Court has held, in accordance with this Circuit's precedents, "[N]o single factor [in the preliminary injunction test] is dispositive." Kelso v. United States Dep't of State, 13 F. Supp. 2d 1, 3 (D.D.C. 1998). The preliminary injunction "calculus reflects a sliding scale approach." Id.

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Date: January 20, 1999

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105th CONGRESS
1st SESSION

H.R. 1151

IN THE HOUSE OF REPRESENTATIVES

Mr. LaTourette introduced the following bill; which was referred to the Committee on _____

_____

A BILL

To amend the Federal Credit Union Act to clarify existing law and ratify the longstanding policy of the National Credit Union Administration Board with regard to field of membership of Federal credit unions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Credit Union Member-

5 ship Access Act".

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H.L.C.

1 SEC. 2 FEELD OF MEMBERSHIP OF FEDERAL CREDIT

2 UNIONS.

3 Section. 109 of the Federal Credit Union Act (12

4 U.S.C. 1759) is amended by striking "Federal credit

5 union membership shall be limited to groups having a

6 common bond" and inserting "the membership of any

7 Federal credit union shall be limited to 1. or more groups

8 each of which have (within such group) a common bond".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OV COLUMBIA

AMERTCAN BANK ASSOCIATION,

P1aintiff,

V. **CIV. A. NO. 99-0042 (CKK)**

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant,

DEFENDANTS MOTION FOR LEAVE, TO FILE A REPLY TO PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendant respectfully moves the Court for an order permitting defendant to file a surreply to plaintiff's reply to defendant's opposition to plaintiff's motion for preliminary injunction. The proposed surreply, the grounds for this request and a proposed order are submitted herewith.1/

1/ Counsel for plaintiff has informed counsel for defendant that it cannot state at this time whether it opposes this motion.

Dated: Jan. 25, 1999

Respectfully submitted,

of Counsel:

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IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,

Plaintiff,

V. CIV. A. NO. 99-0042

NATIONAL CREDIT UNION
ADMINISTRATION,

Defendant,

DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR LEAVE TO FILE A SURREPLY TO PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PERLIMINARY INJUNCTION

Defendant has respectfully moved the court for an order permitting defendant to file a surreply to plaintiff's reply to defendant's opposition to plaintiff's motion for preliminary injunction. The grounds for this request are as follows:

1. On January 8, 1999, plaintiff filed its motion for preliminary injunction. On January 15, 1999, defendant submitted its opposition to plaintiff's motion for preliminary injunction, Plaintiff filed a reply to defendant's opposition, which it served by mail on January 20, 1999, and filed a corrected version of the reply, which it served by hand, on January 21, 1999.

2. In its reply brief, plaintiff makes a number of assertions that defendant believes are incorrect and which could mislead the Court.

3. To respond to these assertions, defendant requests leave to file a brief (less than 15 pages) surreply.

4. Because a hearing has not been set in this matter, submission of the surreply should not interfere with the Court's schedule.

Wherefore, defendant respectfully requests an order permitting the filing of the attached surreply.

Dated: Jan. 25, 1999

Respectfully submitted,

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United States Attorney

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_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,

Plaintiff,

V. Civ. A. No. 99-0042 (CKK)

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

ORDER

Upon consideration, of Defendant's Motion for Leave to File a Surreply to Plaintiff's Reply to Defendants, Opposition to Plaintiff's Motion for Preliminary Injunction, the memorandum in support thereof, and the record in this matter,

IT IS HEREBY ORDERED THAT Defendant's Motion for Leave to File a Surreply to Plaintiff's Reply to Defendant's opposition to Plaintiff's Motion for Preliminary injunction be and hereby is granted; and

IT IS FURTHER ORDERED THAT the surreply submitted by defendant in connection with its motion may be filed by the Clerk of court.

_____

Dated: UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION,

Plaintiff,

V. Civ. A. No. 99-0042

NATIONAL CREDIT UNION
ADMINISTRATION,

Defendant.

**DEFENDANT'S SURREPLY TO PLAINTIFF'S
REPLY TO DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I. Plaintiff Is Unlikely to Succeed on the Merits

A. Rules Governing Chartering Multiple Common-Bond Credit Unions

1. Congress Has Expressly Authorized Expansion of Multiple Common-Bond Credit Unions

It is simply beyond cavil that 1759(d) of the Credit Union Membership Access Act, P. L. 105-219, Title I, §5 101-103, 112 Stat. 914, 917, codified at 12 U.S.C. 6 1759 ("Act"), grants defendant NCUA extremely broad discretion to evaluate charter requests. In the exercise of this discretion, the agency determines whether groups of more than 3,000 potential primary members can form separately chartered credit unions or should instead be added to extant credit unions. See Defendant's Opposition at 22-31, 33-36. In its selective presentation of the statute, plaintiff omits a key provision and this omission should not mislead the Court. Specifically, 6 3.759(d) (2) (A) (i) states that groups of over 3,000 members may be added to a multiple common-bond credit union if "the group lacks sufficient volunteer and other resources to support the efficient and effective, operation of a credit union." Compare Plaintiff's Reply at 4 (statute provides that group of more than

3,000 may be added to multiple common-bond credit union if the group "lacks sufficient resources to operate a credit union") Based in no mull part on Congress' express reference to "volunteer resources, the NCUA has correctly determined to take into account a group's willingness to and capacity for forming its own credit union instead of joining an extant, credit union.

Moreover, plaintiff seems to contend that the NCUA will automatically allow a group of more than 3,000 potential primary members to join an existing, credit union if the group so prefers. This assertion essentially charges that the agency will not do its job. If a group has the resources to operate efficiently and safely as a single common-bond credit union, the NCUA will deny the group's request to be added to an extant credit union. Indeed, in the first week after the Final Rule was in place, that is exactly what happened. See Loftus Dec., attached as Exhibit E to Defendant's Opposition, at 4.[1/]

[1/] **Plaintiff complains of the NCUA's alleged "outrageous" conduct in providing information about its recent chartering decisions to the National Association of Federal Credit Unions ("NAFCU") but not to Plaintiff. See Reply at 17 n.18. This is simply untrue. The chart utilized by NAFCU has been available to anyone that contacted the NCUA's public affairs office. The NCUA cannot be faulted for plaintiff's failure to do so. Finally, plaintiff contends that it has made numerous requests for information about chartering decisions like the material provided to NAFCU. See id. Again, this is untrue. Plaintiff has requested the underlying applications of groups seeking to added to multiple common-bond credit unions and NCUA workpapers**

2. The NCUA's Approach to Chartering Groups of Less than 3,000 Potential Primary Members an Single Common-Bond Credit Unions

Plaintiff charges that the NCUA will "assume" that groups of less than 3,000 potential primary members cannot be separately chartered. Reply at 6. This contention is wrong., The NCUA will require separate chartering of any group, regardless of size, that can operate a solvent, successful credit union.2/ As Congress recognized in the Act, however, it in an undeniable fact that groups with fewer -members may not be as capable of setting up, operating and managing their own single common-bond credit unions as groups with more numerous potential primary members. Accordingly, while the NCUA "assumes" nothing, it must pay special attention to smaller groups, applications to form single common-bond credit unions. To do otherwise would be inconsistent with the NCUA's obligation to ensure the economic viability of credit unions and the financial security of the National Credit Union Share Insurance Fund ("NCUSIF").3/

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related to its analysis of these applications, not the NCUA's tally of its decisions.

2/ **In practice the agency actively assists small and low-income groups seeking to charter their min credit unions . For example, each of the NCUA's six regional offices have personnel trained and available to counsel these groups and the agency has established an Office of Community Development Credit Unions to provide financial and managerial assistance.**

3/ **In a bid to bolster its woefully deficient claim of irreparable injury, plaintiff claims that the NCUA will "instantly" decide not to charter small groups separately, and points to the agency's chartering decisions during January 1-8, 1999. Reply at 7 n.7. The average size of the groups that applied during this period was a mere 135, well below the 3,000**

3. NCUA's Decision to Count Potential Primary Members for Purposes of the 3,000 Limit

Plaintiff argues that the families of those who actually share a common bond of occupation or association should be counted towards the 3, 000 numerical threshold of 6 1759 (d) because the NCUA supposedly has *provided that immediate [family] members [are] part of the common bond or association." Reply at 9.4/ This claim is not correct. The chartering manual states, and in the past has stated, that "[a] number of persons, by virtue of their close relationship to a common bond group, may be included, at the charter applicant's option, in the field of membership." 63 Fed. Reg. at 72,027 (emphasis added). See also 59 Fed. Reg. at 29,079 (reciting identical language). The provision is briefly captioned as "other persons sharing common bond," but the specific language unambiguously describes family members only as having an association with someone who has a common bond. For this reason and as plaintiff presumably would not contest, it has long been, and continues to be, the NCUA's practice to count only those group members who actually share a common-bond when making chartering decisions.

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threshold that Congress believed would typically require a separately chartered single common-bond credit union.

4/ The Act and its legislative history support the conclusion that only members of the group should be counted. To the extent (if any) that the Act is ambiguous, the NCUA must only provide a reasonable explanation of its approach to counting group size, which it has done.

B. Voluntary Mergers of Multiple Common-Bond Credit Unions

Plaintiff makes the extraordinary suggestion that the NCUA lacks the authority to permit voluntary mergers of multiple common-bond credit unions. See Reply at 9. This suggestion is false. Section 1766(a) of Title 12 states: "[t]he [NCUA] may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merge, consolidation, and dissolution . . . . ." of federal credit unions. (Emphasis added.) Similarly, S 1785 W (3) provides: " [e]xcept with the prior written approval of the [NCUA], no insured credit union shall merge or consolidate with any other insured credit union (Emphasis added.) Unquestionably, Congress has granted the agency the authority to approve mergers of insured credit unions.

C. Regulations Governing Reasonable Proximity

Plaintiff claims that the legislative history of the Act establishes that a "service facility" is a term defined by the NCUA and that definition should not include automatic teller machines ("ATM") and substantially similar machines. Plaintiff's claim misses the point because the Final Rule embodies an entirely reasonable approach to defining "service facility." The Act does not define this term, as plaintiff does not dispute. Thus, any analysis of the definition proceeds under the second step of Chevron.

The Final Rule modified the definition of "service facility" to, among other matters, exclude ATMs, but to include electronic facilities that can provide services

unavailable from an ATM. Plaintiff does not assert that this change to the definition was barred by congress and, in fact, nothing in the Act or it 's a history directs the NCUA not to change the definition of "service facility."5/ Plaintiff's apparent insistence, therefore, that the NCUA cannot amend its definition of "service facility" is meritless.

D. Rules Governing Single Common-Bond Credit Unions

While conceding that one company's ownership of a majority of the shares of another company would be sufficient to establish a common occupational bond, See Reply at 12. n. 12, plaintiff takes issue with a section of the Final Rule that provides that a 10% ownership interest also is sufficient to create such a common bond under certain circumstances. See id., 12-13. Plaintiff thus simply disagrees with the NCUA1s policy judgment in setting, on a sliding scale, the point at which stock ownership gives rise to a common bond. As the Supreme Court and this Circuit recognized in the First National litigation, it is the NCUA, not

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5/ **The legislative history discusses the term "service facility" only in the context of providing service to low-income areas, and not with regard to the addition of groups to multiple common-bond credit unions, and simply expresses a preference against use of ATMs as service facilities in such areas. In the exercise of its expertise, the NCUA determined not to permit the use of ATMs as service facilities under any circumstances. Contrary to plaintiff's view, the legislative history nowhere states, even in that section, that the NCUA1s definition of "service facility" be frozen in time.**

plaintiff, that Congress has entrusted with the plenary authority to charter and regulate credit unions and, as a part of that authority, to define common bond requirements.

Plaintiff cannot point to any aspect of the Act or of the Federal Credit Union Act, 12 U.S.C. 5 1751, at et. seg . ("FCUA"), that restricts the NCUA's authority to define common bond. Accordingly, that plaintiff would have adopted another threshold for the common bond requirement does not render the NCUA's decision arbitrary or capricious.6/

E. Rules Governing Grandfathering Credit Union Members

In an effort to strangle credit unions by denying new members of a group the opportunity to join a multiple common-bond credit union formed prior to the Act, plaintiff contends that the Act's "grandfather clause" provides that only individuals who were members of the group on the date that the Act was adopted can join the credit union. This argument requires the Court to find a murky statutory provision unambiguous and to ignore clear legislative history, established practice in defining a "group," and common sense.

6/ **Plaintiff also seems to suggest that lot ownership would be sufficient In any and all circumstances. This in not a correct reading of the Final Rule: the regulation provides that if one company owns a "controlling interest," and that interest is 10% or more, a common bond exists. See 63 Fed. Reg. at 72,022 (entity must have "controlling ownership interest (which shall not be less than 10 percent) . . . " Obviously, if one company had a lot interest but another had a 30t interest, lot would, not be a controlling interest for purposes of the Final Rule.**

Congress, of course was not writing on a clean slate when it adopted the grandfather clause. To the contrary, it certainly was aware (as are plaintiff and the other parties to this action) that a "group," for purposes of the FCUA, always has been considered to include members of the group at the time it joins a credit union as well as members who join later. This is an entirely practical approach because of the transitory nature of employment by or association with the group. In the Act Congress gave no indication that it intended to depart from this practice; indeed, the legislative history unequivocally expresses the opposite intent. The Senate Report could not be more-clear an this point:

> any individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and <u>any new member of such group is also eligible.</u>

Senate Report at 7 (emphanis added). Similarly, the House Report states:

> [Title I] provides a broad grandfather for all persons and organizations who could be forced out of credit unions by the Supreme Court's decision in [First National]. This section covers all persons or organizations or successors who were members of a federal credit union on the date of enactment of this Act, as well as anyone who is or becomes a member of a group . . .

House Report at 19 (emphasis added).[7] Accordingly, it is plain that Congress intended that new members of groups be eligible to join the group's credit union.[8]

F. The Final Rule Was Issued in Compliance with the APA

The NCUA has fully explained that the usual 30-day waiting period between publication and effective date is inapplicable to the Final Rule (as challenged herein) pursuant to 5 U.S.C. 553(d)(1) and (d)(3). The NCUA notes, however, that plaintiff cites no authority other than its own viewpoint for its theory that the Final Rule does not relieve a restriction within the meaning of U.S.C. 553(d)(1). Plaintiff's opinion is hardly a persuasive basis for so holding.[9]

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[7] **Plaintiff contends that the Court must conclude that because the statute does not contain the precise language from the legislative history emphasized above, Congress's expressed intention should be ignored. See Reply at 14. This argument would require an absurd holding that both houses of Congress adopted a statutory provision that was counter to their specifically stated intentions.**

[8] **Indeed, the "continu[ity]" aspect of the grandfather provision must be read in light of Congress's declared intention of abrogating First National and relieving groups and their credit unions from the effects of that decision. See P. L. 105-219,112 Stat. 914 at 2(2)("Credit unions continue to fulfill this public purpose, and current members and membership groups should not face divestiture from the financial services institution of their choice as a result of recent court action.").**

[9] **The NCUA also notes, that plaintiff observes that the good cause finding was not stated in the rule adopted by the NCUA on December 17, 1998. As plaintiff is well aware, however, this omission was totally inadvertent and was corrected by a vote by the NCUA's board. In any event, the good cause finding was published in the Final Rule, and that is all that the APA requires. See 5 U.S.C. 5 553(d.).**

II. Plaintiff Will Not Suffer Irreparable Injury in the Absence of Preliminary Injunctive Relief

Relying on alleged collateral estoppel and a district court's decision, Plaintiff asserts that it will suffer irreparable harm if emergency injunctive relief is not issued and that the NCOA is barred from disputing that assertion.

Collateral estoppel cannot be properly invoked because the issues plainly are not the same as those previously litigated. Indeed, the Act and the Final Rule were not in existence during the prior litigation and, as plaintiff contends, the policies at issue in the prior litigation-and those at issue here are far from identical. See Reply at 1-2 (the Act did not reinstate the NCUA policies at issue in First National), 20 (Final Rule implements "a new set of statutory authorities and restrictions imposed by Congress" in the Act), 21 (Final Rule "implement(s) a brand new set of statutory guidelines and restrictions"). For these reasons, collateral estoppel is not applicable.

Moreover, neither the First National district court decision nor plaintiff's expert's declaration establish irreparable harm. With regard to the district court decision, this Circuit partially stayed the preliminary injunction, thereby disagreeing with the lower court's findings on irreparable harm. Finally, plaintiff's expert's opinions on irreparable harm are outlandish. See Defendant's Opposition at 47 n. 34.[10/]

10/ Tellingly, plaintiff has not contested that credit unions will be irreparably harmed should the requested injunctive relief issue.

III. Third Parties' Interests Will Not Be Served by Issuance of Emergency Injunctive Relief

Plaintiff contends that "if [it] [is] right, "Reply at 18, the public interest will be served by issuance of preliminary injunctive relief. Because plaintiff demonstrably is not "right," the public interest will not be served through the issuance of preliminary injunctive relief. If the requested injunction issues, credit unions would be prevented from lawfully expanding their membership and capacity to serve their members Furthermore, the public's interest in the proper and timely implementation in the Act will be injured if the NCUA is barred from discharging its oversight role.

CONCLUSION

For the foregoing reasons and those stated in Defendant's Opposition,plaintiff Is motion for preliminary injunction should be denied.

Dated: Jan. 25, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and complete copy of Defendant's Motion for Leave to File a Surreply to Plaintiff's Opposition to Defendant's Opposition to Plaintiffs, Motion for Preliminary Injunction, Defendant's Memorandum in Support of Defendant's Motion for Leave to File a Surreply to Plaintiff's opposition to Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction, proposed order and proposed Surreply to Plaintiff's opposition to Defendant's Opposition to Plaintiffs, Motion for Preliminary Injunction were served by placing said copy in the United states mails, first class postage prepaid, addressed to:

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